(21,586.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 186.

PETER ANDERSON, PLAINTIFF IN ERROR,

vs.

THE UNITED REALTY COMPANY, THE DOW-SNELL COMPANY, JOHN P. FREEMAN, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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a In the Supreme Court of Ohio.

No. 10689.

PETER ANDERSON, Plaintiff in Error,
v.
THE UNITED REALTY COMPANY, THE DOW-SNELL COMPANY, JOHN P. Freeman, Charles R. Messinger, Rosewell E. Messinger, Aaron Chesbrough, Clarence M. Lamb, Edward H. Thompson, Mary E. Nearing, and The Joseph Schlitz Brewing Company, Defendants in Error.

Record.

R. P. Cary, C. H. Trimble, and C. A. Thatcher, attorneys for plaintiff in error.
C. W. Everett, attorney for defendants in error.

[Stamped:] Filed Jul- 6, 1907. Supreme Court of Ohio. Joseph G. Obermeyre, Clerk.

1 In the Supreme Court of Ohio.

(No. 10689.)

PETER ANDERSON, Plaintiff in Error,
v.
THE UNITED REALTY COMPANY, THE DOW-SNELL COMPANY, JOHN P. Freeman, Charles R. Messinger, Rosewell E. Messinger, Aaron Chesbrough, Clarence M. Lamb, Edward H. Thompson, Mary E. Nearing, and The Joseph Schlitz Brewing Company, Defendants in Error.

Petition in Error.

Now comes the plaintiff in error herein and complains of the defendants in error for that the said defendants in error at the January term, 1907, of the circuit court of Lucas county, Ohio, recovered a judgment by the consideration of the said circuit court against this plaintiff in error in a certain action then pending in the said court wherein this plaintiff in error was plaintiff and the said defendants in error were defendants.

Plaintiff in error now attaches hereto and files herewith all the original pleadings, process, bills of exceptions, and a full and true transcript of all docket and journal entries in said case, and says that in said record, judgment, decree, order, findings, and
2 proceedings had in said circuit court there is manifest error to the prejudice of this plaintiff in error in the following among other particulars, to wit:

(1) The said court was without jurisdiction to entertain and de-

termine the issues between plaintiff in error and the said several defendants in error, and to enter judgment thereon, for the reason that one of the parties who was a party defendant in the court of common pleas of Lucas county, Ohio, in this case, to wit, the G. H. Hammond Company, a corporation organized under the laws of the state of Michigan, did on August 25, 1905, file in this case its petition for a removal of this case to the circuit court of the United States, for the Northern District of Ohio, Western Division, together with its bond, all of which was done in conformity with the statutes of the United States, for the purpose of securing a removal of a case from a state to the federal court; that for said reasons, said common pleas court lost all jurisdiction over the subject-matter and parties to this action and the said circuit court was without authority in law to enter the judgment which was entered herein.

(2) The said circuit court erred in overruling the motion of the plaintiff in error suggesting a diminution of the record and praying for an order of the court directing the clerk of the court of common pleas of Lucas county, Ohio, to transmit and file with the papers in this case in the said circuit court the bond of the G. H. Hammond Company filed by said company with its petition for removal, to which action of the court plaintiff in error duly excepted.

(3) The court erred in excluding evidence offered by plaintiff in error in support of his motion suggesting a diminution of the record, and requesting that the court order the clerk of the court of common pleas to transmit the bond filed by the G. H. Hammond Company, which bond was filed with its petition for removal.

(4) The court erred in striking from the reply of plaintiff
3 & 4 in error to the answer of the petition in error, the copy of the bond of the G. H. Hammond Company, attached to said reply.

(5) The court erred in affirming the judgment of the court of common pleas and in refusing to enter judgment in favor of the plaintiff in error.

(6) There are other errors prejudicial to the plaintiff in error, manifest on the face of the record.

Wherefore plaintiff in error prays that said judgment, findings, decree and proceedings may be reversed with costs, and that he may be restored to all things that he has lost thereby.

PETER ANDERSON,
By R. P. CARY,
C. H. TRIMBLE AND
C. A. THATCHER,
Attorneys for Plaintiff in Error.

Circuit Court of Lucas County, Ohio.

(Caption Omitted.)

* * * * * * *

5 Circuit Court of Lucas County, Ohio.

(Caption Omitted.)

Transcript of Journal Entries.

At a term of the above named court, begun and held before the Hon. George R. Haynes, Hon. Robert S. Parker, Hon. Samuel A Wildman, presiding judges, on the 17th day of September, A. D. 1906, among other proceedings had by and before said court on the 12th day of October, A. D. 1906, being the 18th day of said term, as appears by its journal of that day, were the following, viz:

This day duly came on for hearing the motion of the defendants in the above entitled proceedings, other than the defendants in error, the George H. Hammond Company, and the Joseph Schlitz Brewing Company and the Connecticut Mutual Life Insurance Company for an order directing the alleged copy of bond attached to the reply to answer to the petition in error filed herein, stricken from said reply and from the files herein; and the court having heard said motion and the arguments of counsel thereon, being fully advised in the premises, on consideration grants same.

It is therefore hereby ordered that said so-called bond be, and the same hereby is ordered stricken from said reply, and from the files herein, which is done accordingly, to which action of the court plaintiff in error duly excepted.

This day came the defendants in error, the United Realty Company, Rosewell E. Messinger and Charles R. Messinger; and, on application therefor, duly obtained leave of court to forthwith
6 file their joint answer to the petition in error herein; to the granting of which leave, the plaintiff in error then and there duly excepted. Thereupon said joint answer was forthwith filed.

And thereupon, on application of the other defendants in error herein, except the defendants in error, the Connecticut Mutual Life Insurance Company, the George H. Hammond Company and the Joseph Schlitz Brewing Company, duly obtained leave of court to file their joint answer to said petition in error herein; to the granting of which leave, the plaintiff in error then and there duly excepted.

And thereupon, and without waiving such exception to the filing of said joint answer, it was stipulated between plaintiff in error and said other defendants in error, by their respective counsel, that said joint answer of the defendants in error the United Realty Company and others herein to the said petition in error, should for all purposes be regarded and treated as the answer of all of said other defendants in error, except the defendants in error, the Connecticut Mutual Life Insurance Company, the George H. Hammond Company and the Joseph Schlitz Brewing Company.

On the 30th day of October, 1906, being the 33rd day of the September term, 1906, an order in said cause was made, an entry of which appears on the journal of said court in the words and figures as follows, to wit:

This day this cause came on for hearing on the written motion of plaintiff in error, suggesting a diminution of the record and for an order of the court directing the clerk of the court of common pleas of Lucas county, Ohio, to transmit and file with the papers in this case, the papers, documents and records mentioned in said written motion, and the court having heard the evidence and being fully advised in the premises, does hereby overrule and disallow said motion, to which action of the court in overruling and disallowing said motion, the plaintiff in error then and there in open court duly excepts, and is granted the statutory leave and time to pre-
7 pare, file and have allowed his bill of exceptions in this behalf.

On the 25th day of January, 1907, being the 17th day of the January term, 1907, a judgment in said cause was rendered, an entry of which appears on the journal of said court in the words and figures as follows, to wit:

This day came the parties to this cause by their respective attorneys and thereupon this cause came on to be heard upon the petition in error, bill of exceptions, original papers and pleadings, the transcript of record in the court of common pleas, the answer of the defendants in error to the petition in error and the reply of the plaintiff in error to said answer, and the court being fully advised in the premises finds that there is no error to the prejudice of the plaintiff in error in the judgment and proceedings involved in this action, and that the said judgment should be affirmed.

It is therefore ordered that the judgment of the court of common pleas be and the same is hereby affirmed; that the defendants in error recover from the said plaintiff in error their costs herein.

It is further ordered that a special mandate be sent to the court of common pleas to carry this judgment as to costs into execution, to all of which finding, judgment and order of the court the said plaintiff in error in open court then and there duly excepted.

(Certification omitted.)

Circuit Court of Lucas County, Ohio.

(Caption Omitted.)

Petition in Error.

(Filed July 14, 1906.)

Now comes the plaintiff in error herein, and complains of the defendants in error for that the said defendants in error at the January term, 1906, of the court of common pleas of Lucas
8 county, Ohio, recovered a judgment by the consideration of the said court of common pleas against this plaintiff in error

in a certain action then pending in the said court, wherein this plaintiff in error was plaintiff and the said defendants in error were defendants.

Plaintiff in error now attaches hereto and files herewith all the original pleadings, process, bill of exceptions and a full and true transcript of all docket and journal entries, and says that in said record, judgment, decree, orders, findings and proceedings had in said court of common pleas, there is manifest error to the prejudice of this plaintiff in error in the following among other particulars, to wit:

(1) The court was without jurisdiction to entertain and determine the issues between plaintiff and the defendants and to enter judgment thereon, for the reason that the defendant, the G. H. Hammond Company, a corporation organized under the laws of the state of Michigan, did on August 25, 1905, file its petition for a removal of this case to the circuit court of the United States, for the northern district of Ohio, western division, together with its bond, all of which was done in conformity with law; that this court lost all jurisdiction over the subject matter and parties to this action, by reason of said petition and bond for removal, having been so filed by said defendant.

(2) The court erred in admitting evidence offered by the defendants in error, to which action of the court plaintiff in error then and there duly objected and excepted.

(3) The court erred in rejecting evidence offered by plaintiff in error, to which action of the court the plaintiff in error then and there duly excepted.

(4) The court erred in refusing to direct the jury to return a verdict in favor of this plaintiff in error.

(5) The court erred in directing the jury to return a verdict for the defendants in error.

(6) The court erred in overruling the motion of plaintiff in error for a new trial.

9 (7) The verdict of the jury is against the weight of the evidence.

(8) The verdict of the jury is not sustained by sufficient evidence.

(9) The verdict of the jury is contrary to law.

(10) Judgment should have been for plaintiff in error instead of for the defendants in error.

(11) Various errors of law occurring at the trial and duly excepted to by the plaintiff at the time.

(12) There are other errors prejudicial to this plaintiff in error, manifest on the face of the record.

Wherefore plaintiff in error prays that said judgment, findings, decree and proceedings may be reversed with costs, and that he may be restored to all things that he has lost thereby.

PETER ANDERSON,
By RHEA P. CARY AND
C. A. THATCHER,
Attorneys for Plaintiff in Error.

* * * * * * *

In the Court of Common Pleas of Lucas County, Ohio.

(Caption Omitted.)

Petition.

(Filed Aug. 17, 1905.)

Plaintiff says that he is a citizen and resident of the state
10 of Tennessee. That the United Realty Company, the Dow-Snell Company and the Heubner Toledo Breweries Company, are corporations organized and existing under the laws of the state of Ohio, having offices and places of doing business in the city of Toledo, Lucas county, Ohio. That John B. Freeman, Charles R. Messinger, Rosewell E. Messinger, Aaron Chesborough, Clarence M. Lamb, Edward H. Thompson, Mary E. Nearing, George W. Ruhl, Florence Scott Libbey and Mary A. Scott, are citizens and residents of the county of Lucas, state of Ohio. That Susan M. Johnson is a citizen and resident of the city of Boston, Massachusetts. That the Connecticut Mutual Life Insurance Company, is a corporation organized under the laws of the state of Connecticut, having an office and place of doing business in the city of Toledo, Lucas county, Ohio. That the George H. Hammond Company and the Joseph Schlitz Brewing Company are corporations organized under the laws of a state to plaintiff unknown but well known to the defendants (but not the state of Tennessee).

First.

For a first cause of action against the defendants, plaintiff says that he has a legal estate in, is the owner in fee simple of, and is entitled to the immediate possession of the following described real estate, to-wit:—

Lots numbered three hundred and thirty-two (332), two hundred and ninety-eight (298), and one hundred and seventy-six (176), in the Port Lawrence division of the city of Toledo, Lucas county, Ohio.

Also, lots numbered nineteen (19) except the southeast nineteen (19) feet of the southwest eighty (80) feet thereof; twenty-one (21), thirty-three (33), thirty-four (34), eighteen (18) and the southeast nineteen (19) feet of the southwest eighty (80) feet of lot numbered nineteen; ten hundred (1,000), ten hundred and one
11 (1,001), and nine hundred and ninety-two (992), all in the Vistula division of the city of Toledo, Lucas county, Ohio.

That said lots exceed one hundred thousand ($100,000.00) dollars in value.

That the said defendants unlawfully keep the plaintiff out of the possession of said premises.

Second.

For a second cause of action against the said defendants, plaintiff adopts and makes a part hereof each and every allegation hereinbefore set forth and says:

That since the sixteenth day of September, 1902, the plaintiff has had a legal estate in, has been the owner in fee simple of and is entitled to the use and possession of the real estate described in plaintiff's first cause of action.

That the defendants have been wrongfully keeping plaintiff out of the possession of said real estate, and have received the rents, issues and profits therefrom since the said sixteenth day of September, 1902.

That by reason thereof, the plaintiff has lost said rents, issues and profits and has sustained damages by reason of the unlawful withholding of the possession of said property from the plaintiff during said time, all of which is of the value and damage to the plaintiff in a sum in excess of fifty thousand ($50,000.00) dollars, the exact amount to plaintiff unknown but well known to the said defendants.

Wherefore, plaintiff prays for judgment against the said defendants for the recovery of the possession of the said premises hereinbefore described, and also for the said sum of fifty thousand ($50,000.00) dollars, with interest thereon; and also for any rents and profits, or damages, which may accrue subsequently to the filing of this action, up to and including the time that judgment may be entered in favor of plaintiff herein.

12 Plaintiff further prays for costs and all other legal and equitable relief, to which he may be entitled.

PETER ANDERSON,
By RHEA P. CARY AND
CHAS. A. THATCHER,
His Attorneys.

(Verification Omitted.)

(Præcipe Omitted.)

(Summons and Sheriff's Return Omitted.)

In the Court of Common Pleas of Lucas County, Ohio.

(No. 53924.)

(Caption Omitted.)

Separate Answer of the Defendant, The United Realty Company.

(Filed Aug. 17, 1905.)

The defendant, the United Realty Company, for its separate answer to plaintiff's petition and by way of first defense thereto says:

First Defense. Said defendant, the United Realty Company, denies that the plaintiff has a legal estate or title or any other estate or title in or to lot No. thirty-four (34) and the northeasterly two and one-half (2½) feet of lot No. eighteen (18), of the Vistula

division to the city of Toledo, Ohio. Also all that part of lots Nos. one thousand (1,000) and one thousand and one (1,001) of the said Vistula division to the city of Toledo, Ohio, described as follows:

Commencing at the south-east corner of said lot No. one thousand (1,000) at the junction of Cherry street and Water street of said city, and running thence southwesterly along the north-westerly line of Water street one hundred (100) feet; thence northwesterly parallel with Cherry street fifty (50) feet; thence northeast-
13 erly parallel with Water street one hundred (100) feet to the south-west line of Cherry street; thence south-easterly along the south-west line of Cherry street fifty (50) feet to the place of beginning, being a parcel of land fifty (50) feet front on Cherry street by one hundred (100) feet front on Water street, and all of said premises being part of the real estate described in plaintiff's petition.

It denies that the plaintiff is the owner in fee simple or otherwise of said real estate or any part thereof.

It denies that the plaintiff is entitled to the possession of said real estate or any part thereof.

The said The United Realty Company admits that it is now and has been ever since June 5th, 1905, receiving the rents, issues and profits, and now and ever since June 5th, 1905, has been keeping the plaintiff out of the possession of said real estate, but it denies that it has received or is receiving any of the rents, issues or profits, or that it is in any way keeping the plaintiff out of the possession of any part of the other real estate described in plaintiff's petition.

The said The United Realty Company admits that it *that it* is the owner in fee simple, has the legal title to and is in the actual possession of the real estate above particularly described, and has received the rents and profits of said real estate ever since the 5th day of June, A. D., 1905, but it denies it has ever received any rents, issues or profits of any other real estate in plaintiff's petition described.

Second Defense. For its second defense to plaintiff's petition the United Realty Company further says that it has or claims no interest in any of the real estate in plaintiff's petition described, excepting the said lot No. thirty-four (34) and the north-easterly two and one-half (2½) feet of lot No. eighteen (18), and that part of lots Nos. one thousand (1000) and one thousand and one (1001), more particularly described in the first defense of this action, and never has had or claimed any interest in the balance of the said real estate described in plaintiff's petition, and disclaims all right, title or
14–53 interest in all of the other real estate involved in this action.

That none of the other defendants in this action have any right, title or interest in said real estate possessed and claimed by this defendant and particularly described in the first defense of this answer; but said defendants are each in possession of and claim to own and are receiving the rents and profits of separate and distinct parcels of the balance of the real estate described in plaintiff's petition, other than the said land possessed and claimed by this defendant; that this defendant is in no manner keeping the plaintiff

out of the possession of any of the said other real estate described in plaintiff's petition, and at no time has received any part of the rents, issues or profits of said other real estate, and the other defendants in this action have in no manner kept the plaintiff out of the possession of the real estate above described, claimed and possessed by this defendant, nor received any part of the rents, issues or profits thereof, and this defendant therefore says that there are several causes of action improperly joined in plaintiff's petition.

CLAYTON W. EVERETT,
Attorney for The United Realty Co.

(Verification Omitted.)

(It is stipulated that the answers filed by other defendants in said action are all substantially the same as said answer of The United Realty Company.)

* * * * * * *

54 Common Pleas Court of Lucas County, Ohio.

(Caption Omitted.)

Separate Amended Answer of the Defendant The United Realty Company.

(Filed Feb. 19, 1906.)

One of the defendants, the United Realty Company for its separate amended answer to plaintiff's petition and by first defense thereto says:

First Defense. Said defendant, The United Realty Company, denies that the plaintiff has a legal estate or title or any other estate or title in or to lot No. thirty-four (34) and the northeasterly two and one-half (2½) feet of lot No. eighteen (18), of the Vistula Division to the city of Toledo, Ohio; or that part of lots Nos. one thousand (1000) and one thousand and one (1001) of the said Vistula Division to the city of Toledo, Ohio, described as follows: Commencing at the southeast corner of said lot No. one thousand (1000) at the junction of Cherry street and Water street of said city, and running thence southwesterly along the northwesterly line of Water street one hundred (100) feet; thence northwesterly parallel with Cherry street fifty (50) feet; thence northeasterly parallel with Water street one hundred (100) feet to the southwest line of Cherry street; thence southeasterly along the southwest line of Cherry street fifty (50) feet to the place of beginning, being a parcel of land fifty (50) feet front on Cherry street by one hundred (100) feet on Water street, and all of said premises being part of the real estate described in plaintiff's petition.

It denies that the plaintiff is the owner in fee simple or otherwise of said real estate or any part thereof.

It denies that the plaintiff is entitled to the possession of said real estate or any part thereof.

55 The said The United Realty Company admits it is now and has been ever since June 5, 1905, receiving the rents, issues and profits, and now and ever since June 5, 1905, has been keeping the plaintiff out of the possession of said real estate, but it denies that it has received or is receiving any of the rents, issues or profits, or that it is in any way keeping the plaintiff out of the possession of any part of the other real estate described in plaintiff's petition.

The said, The United Realty Company further says that it is the owner in fee simple, has the legal title to and is in the actual possession of the real estate above particularly described, and has received the rents and profits of said real estate ever since the 5th day of June, A. D. 1905, but it denies it has ever received any rents, issues or profits of any other real estate in plaintiff's petition described.

That this defendant's title to said real estate relied on in this defense is other and different from that hereinafter set up in his second defense in this amended answer.

Second Defense. The said defendant for its second defense to plaintiff's petition further says: That all the right, title or interest owned, claimed or held by the plaintiff, Peter Anderson, in or to the real estate involved in this action and described in plaintiff's petition, is derived and claimed by the plaintiff through the will of his grandfather, Henry Anderson, late of the city of Holly Springs, of Marshall county, of the state of Mississippi.

That on the first day of July, A. D. 1841, one Charles Butler of New York City, executed to said Henry Anderson, his note of said date for twenty thousand ($20,000) dollars, payable in one day from its date, with interest thereon at six per cent. per annum; that afterwards on the 23rd day of September, A. D. 1841, the said Charles Butler in order to secure the payment of said note to said Henry Anderson assigned, transferred and set over to the
56 said Henry Anderson, a certain note for twenty-one thousand five hundred ($21,500) dollars, dated May 19, 1838, executed by Edward Bissell to said Charles Butler, together with a certain mortgage securing said note, executed by said Bissell and wife to said Butler, upon among others, all the lots, lands and real estate described in plaintiff's petition, which said mortgage had previously been duly recorded on pages 267 and 269 inclusive, of volume 2 of the public record of mortgages of Lucas county, Ohio, kept in the recorder's office in and for said county; that the said assignment of said mortgage to said Anderson set forth that the same was in trust for the benefit of the said Butler and the said Anderson received from said Butler and at all times thereafter held the said note and mortgage as collateral security for the payment of Butler's said note to the said Anderson and for no other purpose.

That afterwards, on or about the 9th day of September, 1843, the said Henry Anderson, commenced in the court of common pleas of Lucas county, Ohio, his certain action in chancery to foreclose said Bissell's mortgage, wherein he, said Anderson, was complainant and said Edward Bissell and wife and others were defendants; and

such proceedings were had and taken in said action, that the said court at its April term thereof, for the year 1843, entered a decree finding the amount due on said mortgage and ordering the said mortgaged lands sold for the payment thereof, and an order of sale was thereafter issued on said decree to one Edson Allen, master in chancery of said court, who in pursuance of said decree on the 24th day of September, 1844, sold said premises to said Henry Anderson at the price of sixty-nine hundred and twenty-one ($6,921.00) dollars who afterwards received a master's deed for said premises, based on said sale, and dated the 18th day of November, A. D. 1844; that said Charles Butler was not a party to said suit and was not bound thereby, and his rights in said mortgage remained the same as between him and said Anderson, and was in no manner affected by said action, decree, proceedings and sale, but the said
57 Anderson received said deed, and thereafter held whatever title was thereby conveyed to him as security for said Butler's said debt to said Anderson, on the same terms and conditions on which he had previously held the said Bissell note and mortgage.

That after said Anderson received said deed, to-wit, on April 3, A. D. 1846, he departed this life, at and being a resident of the city of Holly Springs, of the state of Mississippi, leaving a will, which was afterwards duly probated, allowed and recorded in and by the probate court of Marshall county, Mississippi, which court by the constitution and laws of said state had jurisdiction to probate said will; that Peter Anderson, the brother of said Henry Anderson, Walter Goodman and Peter W. Lucas, all residents of said Marshall county, Mississippi, were nominated in and by said will as the executors of the will and trustees of the estate of said Henry Anderson, and were afterwards in the month of April, 1846, duly appointed such executors and trustees, and were fully authorized and empowered to execute the last will and testament of said Henry Anderson, deceased, and administer his estate; and the said Peter Anderson, Walter Goodman and Peter W. Lucas duly entered upon their duties as such executors and trustees, and became and from thence continued until some time unknown to this defendant, being after the year 1861, the duly qualified and acting executors of the will and trustees of the estate of said Henry Anderson, deceased.

That while said executors and trustees were acting as aforesaid, the said note, dated July 1, 1841, for $20,000.00, and interest from said date, executed by said Charles Butler to said Henry Anderson came into the hands of the said executors and trustees for collection, who demanded from the said Charles Butler, the said $20,000.00, full face of said note, with interest thereon from July 1, 1841, without any deduction or credit on account of the said lands purchased by the said Henry Anderson as aforesaid, at Toledo, Ohio, at the said foreclosure sale; and the said Charles Butler from time
58 to time thereafter paid to the said executors and trustees on his said note to the said Henry Anderson the full amount due thereon, being the $20,000.00 principal and the interest from July 1, 1841, and in all over thirty-nine thousand ($39,000.00)

dollars; that said Butler paid to said executors and trustees on hi
said note the following amounts at the times hereinafter severall
stated, as follows:

Oct. 1, 1852, By commissions due from the American Land Company to Charles Butler, and received by said executors.....	$5,967.49	
Oct. 1, 1852. By interest on same allowed by said trustees in settlement	1,551.42	
Oct. 1, 1852. By interest on same.....	6.24	
		$7,525.1
Oct. 1, 1849. By cash.....		3,376.5
Oct. 10, 1849. By cash.....		2,700.0
Oct. 1, 1851. By cash.....		1,110.0
Oct. 1, 1852. By cash.....		2,000.0
Oct. 1, 1852. By cash.....		1,669.9
May 4, 1855. By cash.....		3,000.0
Oct. 30, 1855. By cash.....		4,340.0
Oct. 30, 1855. By cash.....		1,027.6
Jan'y 1, 1857. By cash.....		4,000.0
May 7, 1860. By cash.....		2,041.0
Aug. 9, 1860. By cash.....		500.0
Feb'y 1, 1861. By cash.....		2,419.4
May 8, 1861. By cash, per draft of James Anderson on Charles Butler.....		2,172.7
		$37,882.4

which amounted to more than the principal and interest due o
said note, and said Butler paid to said executors and trustees on sai
note further and additional amounts, which amounts and times
such payments are unknown to this defendant, and thereb
59 the said Butler paid more than the principal and interes
of his said note.

That the said Henry Anderson in his life time, and the sai
Peter Anderson, Walter Goodman and Peter W. Lucas, as suc
executors and trustees, afterwards held said lands to secure th
payment of said Butler's note and for the benefit of the said Butl
as their *cestui que* trust, and at all times promised and agreed wit
said Butler to sell, convey, release and surrender said lands to sai
Butler on his paying his said note, which said trustees held fo
collection.

That on or about October 1, 1855, the said Peter Anderso
Walter Goodman and Peter W. Lucas, executors and trustees, d
posited with one Caleb O. Halstead, president of the Manhatta
Company Bank of New York City, their deed, dated October
1855, to said Charles Butler of all the lands included in the sai
Bissell mortgage, and including all the lands involved in this actio
to be delivered to the said Butler on his paying the balance due o
the said Butler note aforesaid.

That in April, A. D. 1860, the said Butler having paid or secure
to the satisfaction of said executors and trustees the balance due o

said Butler note, the said deed by their direction was delivered to the said Butler, who filed the same for record with and the same was recorded by the recorder of Lucas county, Ohio, on May 2, 1860, on page 110 of volume 34, of the public records of deeds of Lucas county, Ohio.

That after the said deed was delivered and recorded as aforesaid, one Calvin Bronson of Toledo, Ohio, the person under whom this defendant claims title to its lands involved in this action, in good faith, and for a valuable consideration, namely: Seventeen thousand five hundred ($17,500.00) dollars paid by him to the said Charles Butler, purchased from the said Charles Butler lots Nos. 18, 19, 20, 21, 30, 31, 32, 33, 34, 1000, 1001, 1008 and 1009, all of the Vistula Division of the city of Toledo, Ohio, being all of the lands involved in this action, excepting the sixty (60) feet front on Lynn street, claimed by the defendant, John P. Freeman, 60–97 and the said Charles Butler by a deed dated the 23rd day of April, 1860, upon and for said consideration paid by said Bronson conveyed said lands to the said Bronson, his heirs and assigns forever; and that this defendant by a regularly executed chain of conveyances from the said Bronson down to itself now owns, holds, and is in possession of that part of said lands included in said Butler's deed, which are set forth in the first defense of this action, and owns all of the right, title and interest acquired by the said Bronson from the said Butler in said part of said lands described in the first defense of this amended answer.

That the said plaintiff, Peter Anderson is the only living descendant and the only heir at law of said Henry Anderson, deceased, and whatever title he has or claims to said premises is derived by, through and under the said Henry Anderson's will and is subject to this defendant's rights and equities in the premises.

That the said plaintiff now alleges, claims and gives out that the said deed from the said executors and trustees to said Charles Butler is, for reasons unknown to this defendant, defective, illegal and insufficient to convey the legal title of said lands. This defendant says that if said deed is, for any reason, insufficient to convey the legal title then the said plaintiff holds whatever, if any, title he may have in said lands in trust and for the benefit of this defendant, and should convey the same to this defendant, the owner of the equitable, if not the legal title to said lands.

CLAYTON W. EVERETT AND
KING & TRACY,
Attorneys for Defendant The United Realty Co.

(Verification Omitted.)

(It is stipulated that the amended answers filed by other defendants in said action are all substantially the same as said amended answer of The United Realty Company.)

* * * * * * *

98 Common Pleas Court of Lucas County, Ohio.

(Caption Omitted.)

Reply.

(Filed Feb. 24, 1906.)

Now comes plaintiff and for reply to the several (answers and) amended answers of the several defendants filed herein, says
99 that he admits that the ownership and title to lot twenty-one, except the southeast nineteen feet of the southwest eighty feet thereof, and lot No. thirty-three, in the Vistula division of the city of Toledo, described in plaintiff's petition, is involved in an action pending between the plaintiff and the defendant, Rosewell E. Messinger, in the circuit court of appeals of the United States, sixth circuit, and were by clerical error included in plaintiff's petition filed herein. Plaintiff therefore, withdraws from this proceeding all questions involved as to the title and ownership of said above named lots, and for the foregoing reason makes no further reply to the several allegations contained in the separate amended answer of Rosewell E. Messinger, filed herein in relation to said lots.

Plaintiff admits that his title to the property described in his petition is derived and claimed by him through the will of his grandfather, Henry Anderson. He admits that Charles Butler executed to Henry Anderson his note for twenty thousand dollars as described in the several amended answers of defendants; and that said Butler assigned, transferred and set over to said Henry Anderson a certain note and mortgage for twenty-one thousand five hundred dollars, executed by Edward Bissell, as collateral security for said note of twenty thousand dollars, so executed and delivered to Henry Anderson by said Butler. He admits that an action was commenced by said Henry Anderson to foreclose said mortgage so given by said Bissell, and that a decree was rendered in said action, and that a sale of the premises described in plaintiff's petition was made by Edson Allen, master commissioner in chancery, to Henry Anderson on the 24th day of September, 1844, for the sum of six thousand nine hundred and twenty-one dollars, and a deed was duly executed and delivered by said master to the said Henry Anderson for all of said premises, on November 18th, 1844.

Plaintiff avers that the said Henry Anderson thereby acquired absolute title to all of the property described in plaintiff's
100 petition, and that at no time after the action, decree, proceedings and sale in said case, was his said title burdened or charged with any trust in favor of the said Butler.

Plaintiff admits that said Henry Anderson departed this life April 3rd, 1846, and left a will which was duly probated as alleged in defendants' amended answers, and that the various persons named in defendants' amended answers were nominated as executors in said will, and that said persons qualified under said will.

Plaintiff admits that Calvin Bronson was the grandfather of Rose-

well E. Messinger, and that plaintiff is the only living descendant and heir of Henry Anderson, and claims and gives out that an alleged deed said to have been executed by the executors and trustees of Henry Anderson to Charles Butler, is illegal and insufficient to convey the title of the premises described in plaintiff's petition.

Plaintiff denies each and every allegation contained in the several amended answers of the several defendants, filed herein, except such allegations as are pleaded in his petition and admitted in this reply.

C. A. THATCHER,
RHEA L. CARY,
Attorneys for Plaintiff.

(Verification Omitted.)

Common Pleas Court of Lucas County, Ohio.

(Caption Omitted.)

Reply.

(Filed Mar. 2, 1906.)

Now comes plaintiff and for reply to the several amended answers of the several defendants filed herein, says that he admits that the ownership and title to lot 21, except the southeast nineteen feet of the southwest eighty feet thereof, and lot No. 33, in the 101 Vistula division of the city of Toledo, Ohio, described in plaintiff's petition, is involved in an action pending between the plaintiff and the defendant, Rosewell E. Messinger, in the circuit court of appeals of the United States, sixth circuit, and were by clerical error included in plaintiff's petition filed herein. Plaintiff therefore, withdraws from this proceeding all questions involved as to the title and ownership of said above named lots, and for the foregoing reason makes no further reply to the several allegations contained in the separate amended answer of Rosewell E. Messinger, filed here in relation to said lots.

Plaintiff admits that his title to the property described in his petition is derived and claimed by him through the will of his grandfather, Henry Anderson. He admits that Charles Butler executed to Henry Anderson his note for twenty thousand dollars as described in the several amended answers of defendants; and that said Butler assigned, transferred and set over to said Henry Anderson a certain note and mortgage for twenty-one thousand five hundred dollars, executed by Edward Bissell, as collateral security for said note of twenty thousand dollars, so executed and delivered to Henry Anderson by said Butler. He admits that an action was commenced by said Henry Anderson to foreclose said mortgage so given by said Bissell, and that a decree was rendered in said action, and that a sale of the premises described in plaintiff's petition was made by Edson Allen, master commissioner in chancery, to Henry Anderson on the 24th day of September, 1844, for the sum of six thousand nine hun-

dred and twenty-one dollars, and a deed was duly executed and delivered by said master to the said Henry Anderson for all of said premises, on November 18th, 1844.

Plaintiff further says that said action of foreclosure was brought by the said Henry Anderson with the knowledge and at the request of Charles Butler, and that the said Charles Butler was made a party to said action and duly entered his appearance therein. That
102 a decree of foreclosure was entered in said action and said property was ordered by the court to be sold by the said master commissioner. That a public sale of said property was made by said master commissioner and that the said Henry Anderson made the highest bid of any person who bid upon said property, and purchased the same. That said sale was confirmed and a deed of said property was delivered to said Henry Anderson. That said Charles Butler had full knowledge that said property had so been purchased by said Anderson and acquiesced in the purchase of the same by said Anderson and consented to the purchase of said property by said Anderson. That thereafter said Butler made no objection to the purchase of said property by said Anderson, but with full knowledge that the same had been purchased by said Anderson livered by said master to the said Henry Anderson for all of said purchase for many years after the death of the said Anderson, which occurred in the year 1846.

Plaintiff says that he is unable to state the exact time during which the said Butler made no claim to said property, but said fact is well known to the defendant.

Plaintiff says that by reason of the premises, the defendants are estopped from claiming that the said Anderson purchased said property in trust for said Charles Butler.

Plaintiff avers that the said Henry Anderson thereby acquired absolute title to all of the property described in plaintiff's petition, and that at no time after the action, decree, proceedings and sale in said case, was his said title burdened or charged with any trust in favor of the said Butler.

Plaintiff admits that said Henry Anderson departed this life April 3rd, 1846, and left a will which was duly probated as alleged in defendants' amended answers, and that the various persons named in defendants' amended answers were nominated as executors in said will, and that said persons qualified under said will.

Plaintiff admits that Calvin Bronson was the grandfather
103 of Rosewell E. Messinger, and that plaintiff is the only living descendant and heir of Henry Anderson, and claims and gives out that an alleged deed said to have been executed by the executors and trustees of Henry Anderson to Charles Butler, is illegal and insufficient to convey the title of the premises described in plaintiff's petition. Plaintiff denies each and every allegation contained in the several answers of the several defendants, filed herein, except such allegations as are pleaded in his petition and admitted in this reply.

RHEA P. CARY and
C. A. THATCHER,
Attorneys for Plaintiff.

(Verification Omitted.)

Common Pleas Court of Lucas County, Ohio.

(Caption Omitted.)

Motion.

(Filed Mar. 3, 1906.)

Now comes the plaintiff and moves the court to set aside the verdict of the jury and grant a new trial in this action for the following reasons:

1. The court erred in directing the jury to return a verdict for defendants.
2. The court erred in admitting testimony offered by defendants to which plaintiff duly objected and excepted.
3. The verdict of the jury is against the weight of the evidence.
4. The verdict of the jury is contrary to law.
5. Other errors occurring at the trial to which plaintiff duly excepted.

104 6. For other manifest errors apparent on the face of the record.

PETER ANDERSON,
By RHEA P. CARY,
C. A. THATCHER,
His Attorneys.

Common Pleas Court of Lucas County, Ohio.

(Caption Omitted.)

Before Tyler, J., and a Jury, February 23, 1906.

Plaintiff's Bill of Exceptions.

(Filed Apr. 25, 1906.)

Appearances.

For Plaintiff: Rhea P. Cary, Esq., C. A. Thatcher, Esq.
For Defendants: C. W. Everett, Esq., O. B. Snider, Esq., King & Tracy, E. E. Davis, Esq., Swayne, Hayes, Fuller & Tyler, Rhoades & Rhoades, Geo. A. Bassett, Esq.

Plaintiff's Bill of Exceptions.

Be it remembered, that on the trial of this cause in the court of common pleas of Lucas county, Ohio, before the Hon. Julian H.

Tyler, one of the judges of said court, and a jury duly impaneled and sworn, at the January term thereof, A. D. 1906, the following proceedings were had:

Testimony on Behalf of Plaintiff.

Plaintiff, to maintain the issues on his part, offered and read in evidence Secs. 1, 2, 3, 4, 5, 6, 7 and 25 of the stipulation Exhibit No. 1 which is hereto attached and made a part hereof, so marked.

Plaintiff likewise offered and read in evidence Exhibits A
105 and B to said stipulation Exhibit No. 1 hereto attached and made a part hereof; Exhibit A being the copy of a contract between Henry Anderson and Charles Butler, dated October 4, 1844; and Exhibit B being a copy of will of Henry Anderson.

Plaintiff likewise offered and read in evidence copy of deed from Allen, master commissioner, to Henry Anderson, dated November 18, 1844, which is hereto attached and made a part thereof, marked Exhibit No. 2.

Thereupon plaintiff rested.

Testimony on Behalf of Defendants.

Defendants, to maintain the issues on their part, offered and read in evidence, each of sections 8 and 9, and the second paragraph of No. 11 and all of 12 to 25 inclusive, of said stipulation Exhibit No. 1, hereto attached and made a part hereof, and likewise the concluding unnumbered paragraph of said stipulation. To each of the paragraphs of said stipulations so offered and received by the court, plaintiff at the time separately objected, and each of said objections was at the time overruled by the court, to each of which rulings and orders of the court plaintiff at the time separately excepted.

Defendants likewise offered and read in evidence each of Exhibits C, D, G, H, I and J to said Exhibit No. 1 and the stipulations therein contained, to the action of the court in admitting which exhibits plaintiff at the time separately objected, and said objections were in each instance at the time overruled, to each and every of which plaintiff at the time separately excepted.

Defendants likewise offered and read in evidence a certified copy of a deed from Sidney Bissell and Edward Bissell and Jane A. M. Bissell to Charles Butler, dated February 22, 1843, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 3. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence a certified copy of a deed from Peter Anderson and Walter Goodman, trustees and executors of Henry Anderson, deceased, to Charles Butler,
106 dated October 1, 1855, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 4. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence a certified copy of a deed from Peter W. Lucas, executor and trustee, to Charles

Butler, dated April 16, 1860, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 5. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence a certified copy of a deed from James H. Anderson and wife to Charles Butler, dated April 7, 1860, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 6. (Objected to; overruled; plaintiff excepted.)

Defendants also offered and read in evidence a certified copy of a deed from Charles Butler and wife to Calvin Bronson, dated April 23, 1860, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 7. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered in evidence certified copies of certain tax deeds, which were marked Exhibits Nos. 8 to 14, both inclusive. (Objected to; sustained; defendants each excepted.)

(It is agreed by the parties in this case that Mr. O. B. Snider, mentioned in the stipulation, has received, kept, and produced in court the several exhibits mentioned in Exhibit J attached to Exhibit No. 1.)

Defendants likewise offered and read in evidence a statement which is marked Exhibit No. 19, which is hereto attached and made a part hereof. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence a certain receipt, dated New York, September 27, 1852, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 20. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence receipt
107 from Peter Anderson, executor, to Charles Butler, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 21. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence receipt of W. Goodman, July 1, 1841, to Charles Butler, a copy of which is hereto attached and made a part hereof marked Exhibit No. 22. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence receipt of W. Goodman, Ex'r, to Charles Butler, May 12, 1855, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 23. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence a paper a copy of which is hereto attached and made a part hereof, marked Exhibit No. 24. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence a receipt from W. Goodman, Ex'r, to Charles Butler, dated September 27, 1852, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 25. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence a receipt from W. Goodman, Ex'r, to Charles Butler, dated September —, 1852, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 26. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence a draft by James H. Anderson on Charles Butler, dated March 8, 1861, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 27. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence letter of W. Goodman to Charles Butler, March 2, 1854, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 29. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence letter of
108 Butler to Goodman, March 2, 1860, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 34. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence letter of Goodman to Butler, March 19, 1860, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 35. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence letter of Butler to Anderson, May 7, 1860, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 36. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence letter of Butler to Anderson, August 9, 1860, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 38. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence letter of Butler to Anderson, February 1, 1861, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 39. (Objected to; overruled; plaintiff excepted.)

Thereupon both plaintiff and defendants rested.

The above and foregoing, together with exhibits hereto attached and made a part hereof, is all of the evidence either offered or received on this trial of this cause.

Thereupon defendants moved the court to direct a verdict for each of said defendants, which motion, after argument by counsel, was granted by the court, to which plaintiff excepted.

Thereupon the court directed the jury to return a verdict for defendants, and each of them, and against plaintiff, and thereupon the jury, in obedience to said direction, returned a verdict in favor of each of said defendants and against plaintiff; and to the granting of said motion and the verdict aforesaid plaintiff at the time separately excepted.

109 Within three days plaintiff filed his written motion to set aside said verdict and for a new trial of this cause for the reasons therein stated, which motion coming on to be heard was overruled by the court at the January term of this court, on the 31st day of March, 1906, and judgment rendered against plaintiff on said verdict; to each and every of which plaintiff at the time separately excepted.

Now comes plaintiff by his counsel, and presents this his bill of exceptions taken on this trial of this cause, which he says may be

allowed, signed, sealed, and made a part of the record; which is accordingly done this 8th day of May, 1906.

JULIAN H. TYLER, [SEAL.]
Trial Judge.

Received this bill of exceptions May 7, 1906.

JULIAN H. TYLER,
Trial Judge.

(It is stipulated that no oral testimony was offered or received upon the trial of said cause in the court of common pleas.)

Court of Common Pleas of Lucas County, Ohio.

(Caption Omitted.)

Stipulation.

(Filed Apr. 25, 1906.)

EXHIBIT No. 1.

In the above entitled cause it is agreed by and between the parties to this action as follows, viz:

1st. That on the 19th day of May, A. D. 1838, at the time of the execution of the mortgage, hereinafter mentioned, on the land involved in this case, by Edward Bissell and his wife, Jane A. M. Bissell of the city of Toledo, Ohio, to Charles Butler of the city and state of New York, the said Edward Bissell was the owner in fee simple, had the legal title to and was entitled to and in the actual possession of the real estate described in said mortgage, including all of the real estate involved in this action and at the time of the execution of said mortgage there was and now is a regularly executed chain of conveyances in fee simple for said real estate from the government of the United States down to the said Edward Bissell.

2nd. That on the 19th day of May, A. D. 1838, said Edward Bissell and Jane A. M. Bissell of the city of Toledo, Ohio, signed, sealed, executed, acknowledged and delivered in due form of law to Charles Butler of New York City, their mortgage deed of said date when and whereby they did duly grant, bargain, sell and convey to the said Charles Butler, his heirs and assigns forever in fee simple, among other lots and parcels of land, all of the real estate involved in this action to secure the payment of the bond of said Edward Bissell to the said Charles Butler executed on the same date for $21,500.00, payable at the office of the Manhattan Company of the city of New York, within one year from the date of said mortgage, with interest at the rate of seven per cent. per annum, which mortgage was attested by two witnesses and was duly acknowledged according to law, which mortgage was afterwards duly filed for

record May 19, 1838, and recorded by the recorder of Lucas county, Ohio, on June 7th, on pages 267 and 269 inclusive of Volume No. 2 of the public record of mortgages kept and recorded in the recorder's office of Lucas county, Ohio.

That afterwards on September 23, A. D. 1841, the said Charles Butler made an assignment of said mortgage to said Henry Anderson in the words and figures following, to-wit, viz:

"Assignment: I hereby assign this mortgage to Henry Anderson on certain trusts set forth in a deed this day made. September 23, 1841. Charles Butler."

Which assignment was duly recorded on the margin of the record of said mortgage, in Lucas county, Ohio, on September 30, A. D. 1843.

3rd. That on the 19th day of September, A. D. 1843, said Henry Anderson claiming to be the assignee of said mortgage exe-
111 cuted by said Edward Bissell and wife to said Butler filed his bill in chancery in the court of common pleas of Lucas county, Ohio, on the chancery side of said court to foreclose the aforesaid mortgage; the said Henry Anderson was complainant in said action and Edward Bissell, Jane A. M. Bissell, Frederick Bissell, Sidney Bissell and Charles Butler, were named as defendants in said bill; that said Henry Anderson by his said bill, alleged and set forth the execution by said Edward Bissell and Jane A. M. Bissell, his wife, of the said bond and mortgage, and the non-payment thereof, and said bill in no way made any allegations against the said Charles Butler, except to allege the assignment of said mortgage by the said Charles Butler, to the said Henry Anderson, in words and figures as follows:

"Your orator further represents that on the 23rd day of September in the year of our Lord 1841, the said mortgage and bond was duly transferred and assigned to your orator by the said Charles Butler."

The only prayer or relief asked for in said bill is in the words and figures following, to-wit, viz:

"Your orator therefore prays that the writ of subpœna may issue against the said Edward Bissell, Jane A. M. Bissell, Charles Butler, Frederick Bissell and Laverett Bissell that they may be compelled to answer all and singular the premises, that an account may be taken of what is due to your orator for his principal and interest aforesaid; that said Frederick Bissell, Sidney Bissell, Charles Butler, Jane A. M. Bissell may be forever barred and foreclosed of and from all right and equity of, in and to said mortgaged premises, and that your orator may have such other and further relief in the premises as equity and good conscience may require."

That all the defendants in said action, except Charles Butler, were either duly served with subpœna or entered their appearance in said action, but the said Charles Butler was not served with subpœna or other process, and in no manner entered his appearance in said action, and the said court in said action in no manner
112 acquired jurisdiction over said Charles Butler; that afterwards on the first day of April, in the year A. D. 1844, a

decree was duly entered in said action ordering the said premises to be advertised and sold according to law for the payment of the $29,139.01 found due the complainant, Henry Anderson, on said bond and mortgage from the defendant, Edward Bissell; and one Edson Allen, master commissioner in chancery in said court, was appointed to sell said premises, and that afterwards the said master commissioner in pursuance of the decree of the court in said action sold the real estate involved in said action including all the real estate involved in this action to the complainant, Henry Anderson, at the price of $6,921.00, which sale was afterwards duly confirmed by the court and the said Edson Allen as said master commissioner making said sale was ordered by said court to convey said real estate in fee simple to the said purchaser, Henry Anderson, his heirs and assigns forever, and that afterwards on the 18th day of November, 1844, the said Edson Allen as such master commissioner, in pursuance of the decree rendered in said action of said sale and the confirmation thereof, and in pursuance of the order of said court, did execute his master commissioner's deed to the said Henry Anderson, dated the 18th day of November, 1844, whereby the said master commissioner conveyed to the said Henry Anderson, his heirs and assigns forever, all the real estate involved in said action and all the real estate involved in this action, which deed was afterwards duly filed for record with the recorder of Lucas county, Ohio, and by him duly recorded on page 168 of volume 10 of the public record of deeds, kept in the recorder's office of Lucas county, Ohio.

That all the proceedings in said foreclosure suit were regular and legal, excepting the failure or omission to serve said Charles Butler with subpœna, or in some manner acquire jurisdiction as to him, which plaintiff does not admit to have been necessary.

That the sale of said real estate by Edson Allen, master
113 in chancery, as aforesaid, to Henry Anderson, was on the 24th day of September, A. D. 1844. That after said sale the said Henry Anderson and Charles Butler entered into a written contract, a copy of which is hereto attached, marked "Exhibit A" and hereby made part hereof.

4th. That Henry Anderson, at the time of his death, was a resident of Holly Springs, Marshall county, of the state of Mississippi; that said Henry Anderson made and executed his last will and testament, dated the 28th day of February, A. D. 1846, and afterwards on the 3rd day of April, of said year died, after which his last will and testament was duly probated in and by the probate court of Marshall county, Mississippi, which said court by the laws of the state of Mississippi had jurisdiction to probate said will, which afterwards was recorded in said probate court as the last will and testament of the said Henry Anderson, deceased, and that afterwards a duly authenticated copy of said last will and testament with the proceedings admitting it to probate and record, taken from the records of said probate court of Marshall county, Mississippi, was filed in the probate court of Lucas county, Ohio, and by it was duly admitted to probate and record on April 20, 1860, as a will from another state, and then and thereby became and now is the last will and testa-

ment of the said Henry Anderson, deceased, and is in full force and effect; a true, full and correct copy of said will is hereto attached, marked "Exhibit B," and hereby made a part hereof.

5th. That the said Henry Anderson, upon his death, left surviving him, his two sons, his only heirs at law, to-wit: William Anderson, born February 12, 1828, and James H. Anderson, born June 25, 1831; that said William Anderson died intestate January, A. D. 1850, unmarried and without issue; that the father and mother of said Henry Anderson had each died prior to the time he made his said will.

6th. That said James H. Anderson, surviving son of Henry
114 Anderson, died intestate at the city of Memphis, in the state of Tennessee, on September 16, A. D. 1902, leaving surviving as his only child, and only heir at law, the plaintiff, Peter Anderson, who was born August 27, 1859, and who is the grandson and only grandchild and only living descendant of the said Henry Anderson, deceased.

7th. That at the time of the commencement of this action the defendants, The United Realty Company, The Dow & Snell Company, John P. Freeman, Charles R. Messinger, Rosewell E. Messinger, Aaron Chesbrough, Clarence M. Lamb, Edward H. Thompson and Mary E. Nearing, were severally in the possession of the parts of the real estate involved in this action described in their several answers and hereinafter more fully described, and excepting the defendant, The United Realty Company, had been in such possession and had received the rents of the several properties possessed by them respectively since the 16th day of September, A. D. 1902, and the United Realty Company had been in the possession of the part claimed by it and received the rents and profits thereof since the — day of ——, A. D. 1904, and that each of said defendants at the commencement of this action was keeping the plaintiff out of the possession of the lots and lands possessed by such defendants respectively, and hereinafter particularly described; but neither was in possession and has not received the rents or profits and has not kept plaintiff out of the possession of, and is not and never was interested in any other lot or parcel of land involved in this action.

8th. That Peter Anderson and Walter Goodman of Holly Springs, Mississippi, two of the executors of the will and trustees of the estate of Henry Anderson, deceased, executed a deed purporting to convey to said Charles Butler, all the real estate involved in this action, which deed was duly signed, sealed, acknowledged and executed by said Peter Anderson and Walter Goodman as said executors and trustees according to the laws of the state of Ohio, in the presence of two witnesses, who signed as such and said deed was dated
115 October 1, 1855, and was recorded on May 2, 1860, on page 110 of volume 34 of the record of deeds of Lucas county, Ohio; a copy of said deed is hereto attached and marked "Exhibit C," and hereby made a part hereof; that shortly after the date of said deed, said executors and trustees placed said deed in the hands of Caleb O. Halstead, then the president of the bank of the Manhattan Company, in the city of New York, with instructions to deliver

the same to Charles Butler upon the payment by him of the balance due upon Charles Butler's note for $20,000.00 herein referred to.

That sometime prior to May 1, 1860, the said executors and trustees made a settlement of said trust with James H. Anderson and turned over to him all of the estate in their hands belonging to him, and then directed the said Caleb O. Halstead and the said The Manhattan Bank to turn over to James H. Anderson any payments which might thereafter be made to said bank by said Butler upon his saiad note, and that any payments thereafter made upon said note were so made and turned over to James H. Anderson, and that the said deed of the said executors was not delivered by said Halstead or said bank to the said Charles Butler until about the first day of May, A. D. 1860; that said executors and trustees did not at any time execute any conveyance to said James H. Anderson or turn over to him or put him in possession of any of the lands described in the said deed to said Charles Butler, of which the lands involved in this action are a part.

That the facts in this clause stipulated shall not preclude either party from offering other evidence modifying, limiting or qualifying any fact in this clause stated, including evidence establishing the delivery of said deed to said Halstead or said bank as an escrow.

9th. That Peter W. Lucas, one of the executors of the will and trustees of the estate of Henry Anderson, deceased, executed a deed purporting to convey to said Charles Butler, all the real estate involved in this action, which deed was duly signed, sealed,
116 acknowledged and executed by said Peter W. Lucas, as said executor and trustee according to the laws of the state of Ohio, in the presence of two witnesses, who signed as such, was dated the 16th day of April, 1860, was delivered on or about May 1, 1860, and was received for record May 2, 1860, and was recorded May 3, 1860, on page 112 of volume 34 of the record of deeds of Lucas county, Ohio, a true, full and correct copy of which deed is hereto attached, marked "Exhibit D," and hereby made a part hereof.

10th. That on or about October 10, 1849, said William Anderson of Holly Springs, Mississippi, one of said sons of Henry Anderson, deceased, and the uncle of plaintiff, duly executed a certain agreement in writing relating to the real estate involved in this action; that said agreement was also duly executed by Charles Butler and attested by S. H. Fleetwood, a full and true copy of said agreement being hereto attached marked "Exhibit E," and is hereby made part hereof.

11th. That on or about September 16, 1851, said James H. Anderson, of Holly Springs, Mississippi, the then only surviving son of Henry Anderson, deceased, and the father of plaintiff, executed, acknowledged and delivered a certain written contract to said Charles Butler, bearing said date, and relating to the real estate in controversy in this cause, a full and true copy of said agreement and the official acknowledgments thereof being hereto attached and marked "Exhibit F," and hereby made a part hereof.

That on or about the 7th day of April, 1860, James H. Ander-

son of Holly Springs, in the state of Mississippi, the then surviving son of Henry Anderson, deceased, and the father of plaintiff, executed a quitclaim deed purporting to convey to the said Charles Butler all the real estate involved in this action, which said deed was duly signed, sealed, acknowledged and executed by the said James H. Anderson, in the presence of two witnesses who signed said deed as such, which deed was received for record May 2, 1860, and was duly recorded in Lucas county, Ohio, on May 3, 1860; a
117 true, full and correct copy of said deed is hereto attached, marked "Exhibit G," and hereby made a part hereof.

12th. That on March 13, 1843, said Edward Bissell and Jane A. M. Bissell, his wife, of Toledo, Ohio, and Sidney Bissell of the same place, made, executed, acknowledged and delivered their quitclaim deed dated February 22, 1843, to Charles Butler of New York City, of all the real estate involved in this action, which deed was attested by two witnesses, who signed as such and was duly filed for record October 11, 1849, and recorded on October 13, 1849, on page 446 of volume 16 of the public records of deeds kept and recorded in the recorder's office of Lucas county, Ohio, a true, full and correct copy of said deed is hereto attached, marked "Exhibit H," and hereby made part hereof.

13th. That after Peter W. Lucas and Walter Goodman, were appointed and qualified as executors of the will and trustees of the estate of Henry Anderson, deceased, they made an inventory of the personal assets of said estate and included therein the note executed by said Charles Butler to Henry Anderson for $20,000.00, dated July 1, 1841, and thereafter duly filed said inventory in the probate court of Marshall county, Mississippi, where the said Anderson resided at the time of his death as required by the laws of said state.

That thereafter the said Charles Butler made sundry payments upon said note to said executors and the said executors included in their annual reports and settlements in said court with said estate the sundry payments made by said Butler to said executors on such note as follows, viz:

October 10, 1849, paid 5th report	$3,376.52
October 10, 1849, paid 5th report	2,700.00
October 1, 1851, paid 5th report	1,110.00
October 1, 1852, credit by commission, 7th report	5,967.49
October 1, 1852, by interest on same, 7th report	1,551.42
118 October 1, 1852, 7th report	2,000.00
October 1, 1852, 7th report	1,669.96
May 4, 1855, 9th report	3,000.00
October 30, 1855, paid principal, 10th report	4,340.00
October 30, 1855, paid interest, 10th report	1,027.60
	$26,742.03

The foregoing statement shall not be construed to be an admission by the defendants that the foregoing were all of the payments made by said Butler, but the said defendants shall be at liberty to introduce evidence of additional payments on said note.

14th. That on or about September 21, 1841, said Charles Butler and said Henry Anderson duly executed a written agreement, bearing said date and relating to the division between them of certain commissions arising out of their real estate transactions, a full and true copy of which agreement is hereto attached, marked "Exhibit I," and is hereby made a part hereof.

15th. That the said Butler executed, acknowledged and delivered a warranty deed for the lots or parcels of land now claimed and possessed by the defendants in this action, to their respective ancestors or grantors as follows, namely:

1st. On April 23, A. D. 1860, said Charles Butler executed and delivered his deed to Calvin Bronson of Toledo, Ohio, of all lots 18, 19, 20, 21, 30, 31, 32, 33, 34, 1000 and 1001 of the Vistula division of the city of Toledo, Ohio, excepting that part thereof claimed and possessed by the defendant, John P. Freeman, hereinafter more particularly described.

2nd. On August 6, A. D. 1860, said Charles Butler executed, acknowledged and delivered a deed to John P. Freeman, senior, the father of defendant, John P. Freeman, of lot eighteen (18), the southeasterly nineteen (19) feet of lot nineteen (19) and the northwesterly eight (8) feet of lot one thousand and one (1001) in and of the Vistula division to the city of Toledo, Ohio, excepting a strip of land two and one-half (2½) feet wide off from the
119 northeast end of said premises, being a parcel of land sixty (60) feet front on the northeast side of Lynn street and extending northeasterly at right angles to said street eighty (80) feet.

3rd. On February 17th, A. D. 1863, said Charles Butler executed, acknowledged and delivered a deed to Washington Hunt and Hiram Walbridge of lot No. nine hundred and ninety-two (992), in and of the Vistula division to the city of Toledo, Ohio.

16th. That shortly after said deeds to them respectively and in the same year of the date of said deeds, the said Calvin Bronson, John P. Freeman, senior, and Washington Hunt and Hiram Walbridge each entered upon the said several premises described in their said respective deeds, claiming said lands respectively under their several deeds and made large and valuable improvements on the said several premises deeded to them by the said Butler.

17th. That the defendants, The United Realty Company, The Dow & Snell Company, Charles R. Messinger, and Rosewell E. Messinger, claiming under said Calvin Bronson, are each in the possession of the parts of said real estate deeded by the said Charles Butler to said Calvin Bronson described in their several answers in this case, and that all the right, title and interest of the said Calvin Bronson in said several parcels of real estate described by said defendants in their several answers has heretofore passed to, vested in and is now owned by the said respective defendants in severalty, and that the said defendants and those under whom they claim title, including said Calvin Bronson have been in the open, exclusive, notorious, continuous possession of said several premises, possessed by them, claiming said land under said Butler's said deed, ever since the date thereof down to the commencement of this action.

That the defendants, Charles R. Messinger and Rosewell E. Messinger, are the grandsons of the said Calvin Bronson, and derive their title to the premises claimed by them respectively by in-
120 heritance from their grandfather, the said Calvin Bronson and the said The Dow & Snell Company and the United Realty Company derive their several titles to the said premises claimed by them by conveyances from a granddaughter of said Calvin Bronson, who inherited her interest in said premises from her grandfather, Calvin Bronson.

That the said parts of said real estate possessed and claimed by the defendants, The United Realty Company, Charles Ruel Messinger, Rosewell E. Messinger and the Dow & Snell Company, are as follows, viz:

The United Realty Company.

1st. Lot No. 34 and the northeasterly 2½ feet of lot 18 of the Vistula division; also all that part of lots Nos. 1000 and 1001 of the Vistula division described as follows: Commencing at the northeast corner of said lot 1000 at the junction of Cherry street and Water street of said city and running thence southwesterly along the northwesterly line of Water street 100 feet; thence northwesterly parallel with Cherry street fifty feet; thence northeasterly parallel with Water street 100 feet to the southwest line of Cherry street; thence southeasterly along the southwest line of Cherry street fifty feet to the place of beginning, being a parcel of land fifty feet front on Cherry street by 100 feet on Water street.

Charles Ruel Messinger.

2nd. Lot No. 33 of the Vistula division to the city of Toledo, Ohio.

Rosewell E. Messinger.

3rd. The northeast 2½ feet of lot No. 18; lot No. 19 except southeast nineteen feet of the southwest eighty feet thereof, and lot 21.

The Dow & Snell Company.

4th. All of lots 1000 and 1001 of the Vistula division, excepting the southwesterly eighty feet of the northwesterly eight feet
121 of lot No. 1001 and also exceeding the following described tract, viz: Commencing at the northeast corner of lot No. 1000 at the junction of Cherry street and Water street of said city and running thence southwesterly along the northwesterly line of Water street 100 feet; thence northwesterly parallel with Cherry street fifty feet; thence northeasterly parallel with Water street 100 feet to the southwest line of Cherry street; thence southeasterly along the southwest line of Cherry street fifty feet to the place of begin-

ning; being a parcel of land fifty feet front on Cherry street by 100 feet on Water street.

18th. That the defendant, John P. Freeman, is the son of John P. Freeman, senior, hereinbefore mentioned, and has heretofore inherited and now owns all the right, title and interest in the above described premises conveyed by Charles Butler to his father, John P. Freeman, senior.

That the defendant, John P. Freeman, claiming under said John P. Freeman, senior, is in the possession of the said real estate and that the defendant, John P. Freeman, and those under whom he claims including his father, John P. Freeman, senior, claiming said land under said Butler's deed, has been in the open, exclusive, continuous possession of said premises possessed by him since the date of the said Butler deed to said John P. Freeman, senior, down to the commencement of this action.

19th. That the defendant, Aaron Chesbrough, Clarence M. Lamb, Edward H. Thompson and Mary E. Nearing respectively claiming under said Washington Hunt and Hiram Walbridge, are each in possession of the respective parts of said lot No. nine hundred and ninety-two (992) of the Vistula division of the city of Toledo, Ohio, described as follows:

Aaron Chesbrough.

1st. A strip of land off from the southwest side of lot No. 992 of the Vistula division of the city of Toledo, Ohio, running
122 from Water street, southeasterly to the dock line of the Maumee river, which is 10.32 feet front on Water street and 12.32 feet front on the dock line, and bounded on the southwest side by the southwest side of said lot and on the northeast side by a straight line.

Clarence M. Lamb and Edward H. Thompson.

2nd. The southwest 54.50 feet of the northeast 77.34 feet of said lot 992 of the Vistula division to the city of Toledo, Ohio, being 54.50 feet front on the southeast side of Water street and extending southeasterly to the Maumee river.

Mary E. Nearing.

3rd. The southwesterly thirty-nine feet of the northeasterly 116.34 feet of said lot No. 992 of the Vistula division to the city of Toledo, Ohio; being a parcel of land thirty-nine feet front on the southeasterly side of Water street and extending southeasterly to the Maumee river.

And that all the right, title and interest of the said Washington Hunt and Hiram Walbridge in said several parcels of real estate claimed by said defendants respectively has heretofore been deeded to, vested in and is now owned by the said respective defendants in

severalty, and that the said Aaron Chesbrough, Clarence M. Lamb, Edward H. Thompson and Mary E. Nearing respectively, and those under whom they claim title to their several portions including the said Washington Hunt and Hiram Walbridge have been in the open, exclusive, notorious and continuous possession of said premises possessed by them respectively claiming the said respective parcel of said land under said deed from said Charles Butler, since the date of the said deed to the said Washington Hunt and Hiram Walbridge.

20th. That all the letters written and sent by Charles Butler of New York City to Henry Anderson of Holly Springs, Mississippi, Walter Goodman, Peter Anderson and James H. Anderson of the same place, or either of them, and the letters from the
123 Manhattan Bank of New York City, Caleb O. Halstead and Stanley H. Fleetwood, to said parties or either of them, and the accounts, documents, statements and schedules accompanying and mentioned in said letters are lost or destroyed.

That subject to such objections as to competency, relevancy and materiality as might be made against the originals were they in existence and duly produced and proven in open court, the letter press copies of said letters, accounts, statements and schedules, kept by Charles Butler and now in the possession of the defendants may be read in evidence on the trial of this case with the same force and effect as the originals would have were they in existence, produced and proven in open court. But no admission is hereby made as to the competency of the originals were they produced as aforesaid, but such competency and relevancy is to be first determined by the court.

21st. That Charles Butler of New York City under whom the defendants claim title to the real estate involved in this action, died at his home in the city of New York, on December 13, 1897.; that the written instruments, books, documents, statements, letters, press copies of letters and statements and all other instruments, described in "Exhibit J," hereto attached and hereby made a part hereof, were each and all at or shortly after the death of said Charles Butler found amongst and with the family and other papers of said Charles Butler; that each and all of said instruments were at all times after the death of said Charles Butler, until shortly before the commencement of this case, in the possession and custody and under the control of Miss Emily O. Butler, the only surviving child and sole heir at law of said Charles Butler, deceased; that shortly before the commencement of this case, said Emily O. Butler delivered each and all of said instruments to her cousin, Mr. Willard Parker Butler, at his law office No. 59 Wall street, in the city of New York, New York, and that each and all of the instruments described in said "Exhibit J" are now produced by him; that each and
124 all of said written instruments, books, documents, statements, and other instruments, described in said "Exhibit J" were written prior to January 1, 1861, and more than thirty years before the commencement of this cause; that to avoid the taking of depositions herein and thus subserve the mutual convenience of

both parties hereto and reduce the expenses of said parties, each and all of said instruments, described in said "Exhibit J" shall, upon the execution hereof, be delivered to Mr. Oliver B. Snider, attorney at law of Toledo, Ohio, to be kept in his custody and under his control until said instruments, or any of them, shall be desired by either of the parties hereto for use upon the trial of this case, when same shall be produced by him for such use, and any further or other proof whatsoever with respect to the genuineness and authenticity of any and all of said instruments described in said "Exhibit J" shall be and hereby is dispensed with, and said instruments, or any of them, described in said "Exhibit J" may be offered in evidence at the trial of this cause by either of said parties without formal notice to produce them, or any of them, any such notice being hereby waived, any such offer, however, of any of said instruments to be subject to objections for want of competency or relevancy for reasons other than the genuineness and authenticity of said instruments, or of any of them, or the omission to give formal notice to produce same.

22nd. That Stanley H. Fleetwood, formerly of the city of New York, was for many years the confidential clerk for Charles Butler, and certain of the letters described in "Exhibit J" purporting to have been written and signed by him, either in his own name or on behalf of Charles Butler, are in the handwriting of said Fleetwood.

23rd. It is further agreed that the said Miss Emily O. Butler and her cousin, Willard Parker Butler, have each made thorough search among the papers, books and documents of the said Charles Butler, deceased, for the said note of $20,000.00 executed by
125 the said Charles Butler to Henry Anderson to secure which the said Charles Butler assigned the Bissell mortgage hereinbefore referred to; that said note was not found among the said papers, books or documents, nor has the same ever been seen by the said Miss Butler or her said cousin, but that among Mr. Butler's papers, some time prior to the year 1904, there was found an envelope marked "Anderson settlement," or something substantially to that effect, containing what appeared to be some letters, accounts and other papers, which said envelope and its contents were destroyed with other papers, all then supposed to be of no value. Of the contents of said envelope nothing further is known.

24th. It is further stipulated that Caleb O. Halstead, who is referred to in the letters described in "Exhibit J" was during his lifetime the president of the bank of the Manhattan Company, of the city of New York, and has been dead for many years; that Willard Parker Butler, with the cashier of the Manhattan National Bank of New York City, the successor of the said Manhattan Bank, has made careful and diligent search among the books, papers and records of said Manhattan National Bank of New York, as to the existence of the deed referred to in the correspondence set forth in "Exhibit J," as having been left with said Halstead at the Manhattan Bank, and no record of information concerning the same could there be found or obtained. That it was, and has been, the custom of said two banks every ten years to destroy their old letters.

25th. That the misjoinder of causes of action in plaintiff's peti-

tion, if such there be, are hereby waived by the defendants and all the parties to this action do hereby consent and agree to try together all the causes of action set forth in plaintiff's petition.

That this cause shall be first tried upon the right to recover the real estate described in what is denominated in the petition as the first cause of action, and that the trial of the second cause of action of plaintiff's petition, being the cause of action for the re-
126 covery of the rents and profits shall be continued until after the determination of the right to recover the real estate. If plaintiff succeeds in the recovery on the first cause of action, the journal entry shall show that the cause is reserved for further determination as to said second cause of action, but if the plaintiff fails in the recovery of the real estate then the journal entry shall dismiss the petition as to both the first and the second causes of action, without prejudice to the right of plaintiff to prosecute error from the judgment that may be entered herein.

The foregoing statement of facts or any part thereof may be used and read in evidence at the trial of this action by either party in lieu of the proofs of the matters herein stated, with the same force and effect that the proof of said facts would have were the same offered and proven in open court in the regular and ordinary way, and subject to any and all objections and exceptions as to competency, relevancy and materiality that might be made against such proof and facts were they offered in the regular way in open court. The said parties are at liberty to offer additional proofs of the foregoing or other facts in this action in support of their respective titles, subject to the same objections and exceptions.

In witness whereof the parties do hereunto sign their names to duplicates hereof on the second day of January, A. D. 1906.

PETER ANDERSON,
By C. A. THATCHER AND
R. P. CARY, *His Attorneys.*
CHARLES R. MESSINGER,
By C. W. EVERETT, *His Attorney.*
THE UNITED REALTY CO.,
By C. W. EVERETT, *Its Attorney.*
AARON CHESBROUGH,
By O. B. SNIDER, *His Attorney.*
THE DOW & SNELL CO.,
By ELMER E. DAVIS, *Its Attorney.*
127 & 128 JOHN P. FREEMAN,
By RHODES & RHODES, *Attorneys.*
MARY E. NEARING,
By RATHBUN FULLER, *Her Attorney.*
CLARENCE M. LAMB AND
EDWARD H. THOMPSON,
By GEO. A. BASSETT, *Their Attorney.*
ROSEWELL E. MESSINGER,
By KING & TRACY, *His Atorneys.*
THE UNITED REALTY COMPANY,
By KING & TRACY AND
C. W. EVERETT, *Its Attorneys.*

* * * * * * *

129 "EXHIBIT B."

I, Henry Anderson, do make and ordain this to be my last will and testament. I declare my domicil to be the town of Holly Springs, Marshall county, state of Mississippi. I revoke the will made by me on the 3rd of March, 1873, and all other wills, if any there be.

Item. I give, devise and bequeath to Peter Anderson, Walter Goodman and Peter W. Lucas, all my property both real and personal, legal and equitable in possession, reversion or remainder, and all claims and demands whatsoever, except such right, title or claim to lands, money or choses in action, as I may be entitled to as one of the agents of the American Land Company and as one of the stockholders in said company; this property they shall hold in
130 trust and if one or more of them die, the survivors or survivor shall hold in trust for the following purposes: they shall pay my debts, other than such as may be owing to the American Land Company, out of moneys on hand and such property as may be sold least injurious to my estate. I wish them to collect debts due to me, and apply to this purpose. They may, if they think fit, and can, obtain an extension of time on any debt, and they may pledge my property to raise money to pay debts. They may sell for cash or on credit, and if at any time, they have funds on hand not required for debts or legacies, they may invest the same. They shall have full power to make titles for property sold and to pay charges for preservation and in all respect have the power of owners but always as trustees. I have entire confidence in each of them and therefore I give each the power of all, so that each may do separately what all acting together may do, except in making investments; in that I wish all to join. The annual accounts of my said trustees signed by their respective names shall be binding on my heirs and shall be conclusively so unless error or fraud be clearly established. I have directed the payment of debts, other than what I may owe the American Land Company. I exclude the debts to the company because that is subject to an account with the company and I do not wish my trustees to make payments before that account is adjusted. The adjustment of that account, and the direction and management of the affairs of the company so far as I have power, right or interest, I place in the hands of Peter Anderson and Walter Goodman and when they have finally closed it, it shall become a part of the trust created by this article of my will and subject to the control of my said trustees. By saying "it shall become a part of the trust" I mean *the effects and proceeds* that I may be entitled to as stockholder and agent of the company.

Item. As agent of the American Land Company jointly with my brother, I am entitled to an account with the trustees, and it is my will that this claim for an account, and all rights, claims and
131 powers growing out of any contract or contracts with the trustees do vest in Peter Anderson and Walter Goodman as I have before said. They shall have power to settle with the trustees immediately or at such time as they may think best, and they shall

be entitled to receive conveyances of land, should a division of land take place, and should the notes of the company be divided, they shall be entitled to receive the same. The lands they may receive shall be taken *to* them as trustees of this my will. They shall have power to execute all papers necessary for a settlement of the agency and all papers executed by them shall be binding on my heirs. When this business is finally closed I direct that they make out and sign a schedule of the property received on account of said interest and an account explanatory of the settlement, and the same shall be taken as a proper inventory and the property therein contained shall thereafter become vested in my trustees created by the first clause of my will, but if there be real estate therein contained, and the same stand in their name, as trustees, that is in the name of Peter Anderson and Walter Goodman as above stated, a title from them shall be good and sufficient to a purchaser. My intention being that this interest shall only come under the administration of the trustees first created and my executors hereinafter named, from and after the time such interest is ascertained by a final close with the company. I have acted as agent for the trustees of the American Land Company in respect to the lands of the company in the state of Arkansas and elsewhere. What may be due me for such services is a claim that I desire to go to the said Peter and Walter and not to my trustees first named. It forms a portion of my claims against the company which I wish settled on the final settlement with them. I suppose I have made myself fully understood, but for greater certainty I repeat that my wish is that nothing be taken from the company—interest for debts or legacies unless for such debts as are connected with the company. At the same time if my other
132 property cannot pay my debts or cannot pay them without injury, and it be found that it would not be unjust to withdraw funds from the company interest, then it may be done, not otherwise. When my interest in the company is finally ascertained, it shall, as I have said, become a part of the trust first created, and the said Peter W. Lucas shall indorse his acceptance of the schedule of the two trustees who have signed it. I give to each, that is, to Peter Anderson and Walter Goodman severally the same powers that both are invested with. In both of the trusts created by this will my trustees shall not be required to give security, nor shall they be liable for each other and their accounts signed by them respectively shall be evidence binding on my heirs of the correctness unless error or fraud be clearly shown.

Item. It is my will that when my son William arrives at the age of twenty-one years the trustees of the first and general trust shall deliver to him a settlement of the affairs of the trust, *and if my debts are then paid, and as soon as that takes place, they shall put him in possession of one-half of my property reserving thereout two-fifths parts of said moiety, by valuation which my said trustees shall hold in trust and properly invest and pay over to him at the age of twenty-five years.* If my interest in the American Land Company be not brought into the general trust at the time William becomes twenty-one, but is brought in any time before he arrives at twenty-five, so

soon as brought in, two-fifths shall be deducted therefrom, and invested and *paid over to him* at twenty-five, the other three-fifths *he shall have* as soon as paid in. I find the above does not express my will in this: when I say two-fifths shall be deducted from the interest I may have in the Land Company for investment, and three-fifths to be paid to him, I mean two-fifths of a moiety shall be deducted and three-fifths of a moiety paid over.

And it is my will that my said trustees hold and invest and pay over the remaining moiety of my estate to my son James at the respective period of twenty-one and twenty-five years of age,
133 being governed as to the amounts to be paid at each of the respective periods by the same rules and directions as are above laid down in the bequest to William, and to be governed in all other respects by the regulations laid down concerning the same.

If either of my sons die *without lineal descendants* the one surviving shall take his estate *above bequeathed,* and if the survivor die without lineal descendants then one-half both of the *decedent's original portion* as well as one-half of the *portion taken by survivorship* shall go to my brother Peter, the other half to such of my brothers and sisters as may be living at the time of the death of such surviving son. If my brother, Peter, be not living at the time of the death of my surviving son, so dying without lineal descendants, then the share he would have taken, if living, shall go to his children living at the time of the decease of my said son, and if there be no children surviving, then the share shall go to my other brother and sisters surviving at the time of such decease of my son. I make the following explanation: The *limitations over* on the death of my surviving son without lineal descendants is intended to take effect if there be no lineal descendants living at the time of the decease of such son. *Nothing in the foregoing will shall be construed as to deprive either of my sons disposing of their portions by will on their attaining the age of twenty-one years respectively. The above limitations over shall give way to the provision of such wills.*

Item. I entered into a contract with the American Land Company to warrantee title to such lands of the company as might be sold, and it so is that many titled bonds are now out binding me to such warrantees, I give to Peter Anderson and Walter Goodman or either of them the power to execute deeds to carry out such warrantees, and I declare that the name of either with the seal of either to such deeds shall bind my heirs, executors and administrators. It is also the case that I hold lands in common with Daniel Saffar-
134 rans. It is important that these lands be sold as purchasers may offer. My undivided half interest has already by this my will been devised to my general trustees. I declare that they or either of them shall have the power to convey with warrantee. This power I presume they have by the first clause of my will, which vests the title in them. I only mention it here for greater certainty.

Item. If my brother, Peter, desires to keep up a household in this place I bequeath to him the use of my house, out houses, stables, lots, household furniture, books, horses, carriages and whatever

belongs to the household establishment and also all my slaves or such of them as he may desire to have. I do not require that any inventory or appraisement of them be made, but on the breaking up of such household, he shall make out an inventory of such as remain unconsumed by use, and my other two trustees shall indorse an acceptance thereof after which time the property in such inventory shall go into the general trust and be subject to all the regulations therein laid down.

Item. I give to my niece, Caroline, daughter of my brother William, one thousand dollars, payable after my debts are satisfied. I direct my executors to pay her sixty dollars per annum as interest thereon from the time of my death until paid.

Item. I give to my niece Rucellea, daughter of my brother Robert, two thousand dollars, payable after my debts are satisfied and I direct my executors to pay her one hundred dollars as interest thereon from my death until paid.

I have directed that a portion of my property *shall be placed in the hands* of my sons on their arriving at twenty-one, and I have directed that my trustees shall have the power to procure extension of my debts, and I have made the payment to my sons dependent on the payment of my debts. Now on reconsideration it occurs to me that it may so happen that there will be outstanding and unadjusted accounts at the time my sons arrive at twenty-one, and yet it might be in no wise injurious or improper *to place my*
135 *sons in possession* of a *part* of *what may be coming to them.* My trustees are therefore authorized, if they think fit, to *let them have a portion of what is coming to them at twenty-one,* even though some debts may remain unpaid. The amount of such portion shall be according to the discretion of my trustees. It shall not exceed the amount that is limited to them on the payment of debts, nor ought it to be an amount that would jeopardize their payment.

Remark. If the payment of the interest on the legacies jeopardize the payment of debts, the payment of such interest must cease without prejudice however to the right of the legatees to have the interest at the time they may be entitled to the principal. I further say that if the bequests to my brother Peter of the use of my household and slaves be found inconveniently to impair the capacity of the executors or trustees to pay debts, the use shall cease and no rights shall arise to him by such lapse or ceasing of the bequest.

I give to my son William my diamond ring. I give to my son James the watch which my son William wears, which belonged to his mother.

I appoint my brother Peter to be guardian of my sons and I direct that no security be required of him.

I appoint my brother Peter and Walter Goodman and Peter W. Lucas to be the executors of this my will and direct that no security be required of either of them.

In testimony that this is my will I have hereto affixed my seal and have subscribed my name and written my name in the margin this 28th of February, 1846.

HENRY ANDERSON. [SEAL.]

We the undersigned attest that Henry Anderson signed and sealed this instrument in our presence and declared it to be his last will and we have subscribed the same in his presence and in the presence of each other.

Z. M. PHELPS,
H. M. LUSHER,
ISAAC SAFFARRANS.

136 "EXHIBIT C."

This indenture made the first day of October, in the year of our Lord one thousand eight hundred and fifty-five, between Peter Anderson and Walter Goodman, both of Holly Springs, in the state of Mississippi, trustees and executors under the last will and testament of Henry Anderson, late of Holly Springs, in said state, deceased, of the first part, and Charles Butler of the city of New York, in the state of New York, of the second part, witnesseth, that the said parties of the first part, by virtue of the power and authority to them given in and by the said last will and testament and for and in consideration of the sum of one dollar (and other considerations) lawful money of the United States of America, to them in hand paid, at or before the ensealing and delivery of these presents, by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part, his heirs and assigns forever released and discharged from the same by these presents, have granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, release, convey and confirm unto the said party of the second part, his assigns forever, all those certain lots or parcels of land situate, lying and being in the Vistula division of the city of Toledo, county of Lucas, state of Ohio, known and designated as lots numbers eighteen (18), nineteen (19), twenty (20), twenty-one (21), one thousand and eight (1,008), one thousand and nine (1,009), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), one thousand (1,000), one thousand and one (1,001), said lots being in one block bounded northerly by Summit street, southerly by Water street, easterly by Cherry street and westerly by Lynn street, also Water lot number nine hundred and ninety-two (992) extending from Water street to the line of wharfing and fronting on the Miami river one hundred and seventy-six feet and sixty-five hundredths of a foot, also town lots in the Port Lawrence
137 division of said city of Toledo, numbered one hundred and eighty-five (185), one hundred and seventy-six (176), one-hundred and eighty-eight (188), two hundred and ninety-eight (298), one hundred and fifty-seven (157), forty-eight (48), two hundred and forty-six (246), two hundred and sixty-two (262), two hundred and eighty-six (286), three hundred and four (304), three hundred and thirty-two (332), three hundred and thirty-three (333), three hundred and thirty-six (336), three hundred and

thirty-seven (337), and three hundred and thirty-eight (338), as the same were laid out and numbered on the recorded map of said city, being the same premises conveyed by Edson Allen, master commissioner in chancery, to Henry Anderson, by deed dated the eighteenth of November, one thousand eight hundred and forty-four.

Together with all and singular the edifices, buildings, rights, members, privileges, advantages, hereditaments and appurtenances to the same belonging, or in any wise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also, all the estate, right, title, interest, claim and demand whatsoever, both in law and equity, which the said testator had in his lifetime, and at the time of his decease, and which the said parties of the first part, or either of them, have or hath, by virtue of the said last will and testament, or otherwise, of, in, and to the same, and every part and parcel thereof, with the appurtenances; to have and to hold the said premises above mentioned and described, and hereby granted and conveyed, or intended so to be, with the appurtenances, *under* the said party of the second part, his heirs and assigns to his and their only proper use, benefit and behoof forever. It being understood that the above described premises were conveyed to Henry Anderson in fee but held by him in his life time as a mortgage to secure the payment of a certain sum of money due from Charles Butler to Henry Anderson which fact, after his death was duly acknowledged under seal of William Anderson and James H. Anderson his only heirs at law; said
138 parties of the first part covenant, grant, promise and agree to and with the said party of the second part, his heirs and assigns, that the said party of the second part, his heirs and assigns, shall and lawfully may from time to time, and at all times forever hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy, all and singular the said hereditaments and premises hereby granted and conveyed, or intended so to be, with their and every of their appurtenances and receive and take the rents, issues and profits thereof, to and for his and their own use and benefit, without any lawful let, suit, hindrance, molestation, interruption or denial whatsoever, of, from, or by them the said parties of the first part, or their assigns; or, of, from, or by any other person or persons whomsoever lawfully claiming, or who shall or may lawfully claim hereafter, by, from, or under them or either of them, or by, from, or under their heirs or assigns, any right, title, interest or estate; and that free and clear, and freely and clearly discharged, acquitted and exonerated, or otherwise well and sufficiently saved, defended, kept harmless and indemnified by them the said parties of the first part, their heirs and assigns, of, from, and against all manner of former and other gifts, grants, bargains, sales, mortgages, judgments and all other charges and incumbrances whatsoever, had, made, committed, executed or done by them the said parties of the first part, or by, through, or with their acts, deeds, means, consent, procurement or privity.

In witness whereof, the said parties to these presents have here-

unto interchangeably set their hands and seals the day and year first above written.

P. ANDERSON. [SEAL.]
W. GOODMAN. [SEAL.]
Executors and Trustees under the Will of H. Anderson, Deceased.

Sealed and delivered in the presence of:
FINLEY I. WRIGHT.
S. H. FLEETWOOD.

139–197 STATE OF NEW YORK,
City and County of New York, ss:

On this ninth day of October, eighteen hundred and fifty-five before me, a commissioner for said state, appointed by the governor of the state of Ohio, to take acknowledgments of deeds to be recorded in said state of Ohio, personally came Peter Anderson and Walter Goodman to me known to be the grantors described in and who executed the within deed and severally acknowledged the signing and sealing of said deed as their voluntary act.

In witness whereof I have hereunto subscribed my name and affixed my official seal.

[SEAL.] STANLEY H. FLEETWOOD,
Commissioner.

(Endorsed:) Peter Anderson and Walter Goodman, trustees and executors of Henry Anderson, deceased, to Charles Butler. Dated 1st of October, 1855. Deed lots in Toledo. Recorder's office, Lucas county, received for record May 2nd, 1860, and recorded May 2nd, 1860, in volume 34 of deeds, pages 110, 111 and 112. Jonathan Wynn, Recorder. Fees $1.35.

(It is stipulated that Exhibit C is Exhibit No. 4 attached to and made part of plaintiff's bill of exceptions in the common pleas court.)

* * * * * * *

198 Court of Common Pleas, Lucas County, Ohio.

Transcript of Journal Entries.

At a term of the above named court, begun and held before the Hon. Jason A. Barber, Hon. Julian H. Tyler, Hon. Lindley
199 W. Morris, Hon. Reynolds R. Kinkade, presiding judges, on the 25th day of September, A. D. 1905, among other proceedings had by and before said court on the 6th day of November, A. D. 1905, being the 37th day of said term, as appears by its journal of that day, were the following, viz:

This day came the plaintiff, in the above entitled action by his attorney and dismissed the said action, without prejudice, as to the

defendants, The G. H. Hammond Company and The Joseph Schlitz Brewing Company. In consideration thereof, said defendant companies withdrew their petitions for the removal of said cause to the United States court.

It is therefore ordered and adjudged by the court that this action be, and the same hereby is, dismissed without prejudice as to said defendants, The G. H. Hammond Company and the Joseph Schlitz Brewing Company, at plaintiff's costs.

Thereupon plaintiff dismissed said action absolutely and upon the merits as to the defendants, The Connecticut Mutual Life Insurance Company, Mary A. Scott, and Florence Scott Libbey, and Susan M. Johnson.

It is therefore ordered and adjudged by the court that this action be, and the same hereby is dismissed absolutely and upon the merits as to said last named defendants, and that they go hence without day and recover their costs herein.

On the 19th day of February, 1906, being the 42nd day of the January Term, 1906, an order in said cause was made, an entry of which appears on the journal of said court in the words and figures as follows, viz:

This day came the parties by their respective attorneys and thereupon this cause came on to be heard upon the motion of certain defendants for leave to file amended answers to the petition herein, and the court, having considered said motion, grants the same, and the defendants, The United Realty Company, The Dow-Snell Company, John B. Freeman, Charles R. Messinger, Rosewell E. Messinger, Aaron Chesbrough, Clarence M. Lamb, Edward H.
200 Thompson, and Mary E. Nearing are given leave to file separate amended answers herein, instanter.

On the 23rd day of February, 1906, being the 46th day of the January term, 1906, an order in said cause was made, an entry of which appears on the journal of said court in the words and figures as follows, viz:

This cause came on to be heard and a jury was empanelled and sworn. Thereupon it is ordered stenographer report the evidence herein.

On the 2nd day of March, 1906, being the 52nd day of the January term, 1906, a verdict in said cause was rendered, an entry of which appears on the journal of said court in the words and figures as follows, viz:

This day came the parties with their attorneys, a jury being called, one came, to-wit: Theo. Meissner, J. M. McCann, Chas. Munday, Martin Neuhausel, A. A. Moody, J. C. Blair, D. J. Nyswander, B. M. Campbell, E. F. Gleason, Fred W. Ruppel, Ernest Blackmore, N. S. Lyons who being duly empanelled and sworn, and being fully advised in the premises, report the following verdict:

We, the jury empanelled in the above entitled action, for verdict find and say that we find for the defendants and for each of them.

FRED. W. RUPPEL, *Foremain.*

On the 31st day of March, 1906, being the 77th day of the January term, 1906, a judgment in said cause was rendered, an entry of which appears on the journal of said court in the words and figures as follows, viz:

On this, the thirty-first day of March, 1906, this case came on for hearing on the motion of the plaintiff to set aside the verdict of the jury and grant a new trial. On consideration of said motion, the court finds that said motion is not well taken and hereby overrules the same. It is therefore ordered and adjudged that the petition of the plaintiff be and the same is hereby dismissed and that the defendants have and recover from the plaintiff their costs herein incurred taxed at $—. To which action of the court, the
201 plaintiff then and there duly excepted, and is allowed by the court the statutory time in which to prepare, file and have allowed his bill of exceptions in this case.

JULIAN H. TYLER, *Judge.*

(Certification Omitted.)

* * * * * * *

202 Circuit Court of Lucas County, Ohio.

(Caption Omitted.)

Answer to Petition in Error.

(Filed Oct. 8, 1906.)

For their joint answer to the petition in error herein, the above named defendants in error say that on July 25, 1905, said plaintiff in error, Peter Anderson, filed a petition and precipe for summons in the court of common pleas of Lucas county, Ohio, in cause No. 55,924 therein, against the above named and other defendants, and an answer or demurrer became due from said defendants, and each of them, in said action, on August 25, 1905.

That on said date the defendant, The G. H. Hammond Company, filed a certain paper in the office of the clerk of said court of common pleas, attached to the bill of exceptions herein, and
203 designated "Petition for Removal."

That on August 25, 1905, said court of common pleas of Lucas county, Ohio, was in vacation, and did not reconvene until —— — 1905; that thereafter, without the attention of said court of common pleas having been called to said so-called proceedings in removal, plaintiff in said action, Peter Anderson, agreed with the defendants, The G. H. Hammond Company and the Joseph Schlitz Brewing Company, to dismiss said action as to said defendants, in consideration that said defendant companies should withdraw said so-called proceedings for the removal of said cause to the United States court; and, pursuant to said agreement, said plaintiff below, Peter Anderson, on November 6, 1905, voluntarily appeared before

said court, with said defendants, and dismissed said action as to said defendants, who thereupon, and in consideration thereof, then withdrew said so-called proceedings in removal, and said dismissal and said withdrawal, respectively, were thereupon duly entered at page 544 of journal No. 137 of said court of common pleas.

That on January 13, 1906, and February 24, 1906, said plaintiff below, Peter Anderson, filed with the clerk of said court of common pleas, replies to certain answers filed in said action, and on March 2, 1906, filed with said clerk an amended reply to a certain answer theretofore filed therein.

That on or about January 2, 1906, said Peter Anderson, executed a written stipulation in said action, which he thereafter filed with the clerk of said court of common pleas, which stipulation is attached to the bill of exceptions herein, and these defendants in error say that from said stipulation it appears that said The G. H. Hammond Company and the Joseph Schlitz Brewing Company had and have no interest in any property made the subject of said action; and that at the January term, 1906, of said court of common pleas of Lucas county, Ohio, said plaintiff below, Peter Anderson, appeared in said court and requested and procured said cause
204 to be assigned for trial, and thereafter appeared before said court and participated in the trial of said action, which preceded the final judgment in favor of the defendants in said action.

These answering defendants in error further say, that said plaintiff below, Peter Anderson, at no time excepted or objected to the action of said court of common pleas in asserting, entertaining and exercising jurisdiction of said action, and that said plaintiff below, Peter Anderson, at no time filed a transcript of the proceedings before said court of common pleas, in the office of the clerk of the United States circuit court, for the western division of the northern district of Ohio; and that no transcript of the proceedings in said state court was ever filed by any party to said cause, in the office of said federal court, and these answering defendants in error say that, by reason of the facts aforesaid, said plaintiff in error, Peter Anderson, and all the other parties to said action abandoned and waived the right, if any such he or they had, to complain of the jurisdiction asserted, entertained and exercised by said court of common pleas.

These answering defendants in error further say that there is no error in the record presented to this court by said plaintiff in error.

Wherefore, these answering defendants in error pray that the petition in error be dismissed, and that the judgment of said court of common pleas of Lucas county, Ohio, may be affirmed at the costs of plaintiff in error.

C. W. EVERETT AND
KING & TRACY,
Attorneys for the Defendants in Error, The United Realty Company, Rosewell E. Messinger, and Charles R. Messinger.

(Verification Omitted.)

* * * * * * *

205 Circuit Court of Lucas County, Ohio.

(Caption Omitted.)

Reply to Several Answers to Petition in Error.

(Filed Oct. 9, 1906.)

Now comes the plaintiff in error and for reply to the answer to petition in error filed by the United Realty Company, Rosewell E. Messinger and Charles R. Messinger, and for reply to said answer which by the order of the court shall be treated as an answer filed by each and all of the other defendants in error herein, plaintiff in error says that it is not true and he denies that the attention of the said court of common pleas was not called to the petition for removal filed by the G. H. Hammond Company, and avers that the said court was fully advised of the filing of said petition for

206 removal and of the bond of the said The G. H. Hammond Company, filed with said petition for removal.

Plaintiff in error says that he attaches hereto and tenders herewith a certified copy of said bond and that the same was duly filed in the said court of common pleas on the 25th day of August, 1905, in compliance with the statutes of the United States, requiring a bond to be filed by a defendant who might seek to remove an action from a state court to a federal court.

Plaintiff in error denies that he induced and procured the defendants, the G. H. Hammond Company and the Joseph Schlitz Brewing Company, to dismiss plaintiff's action against said defendants.

Plaintiff in error says that by mutual agreement between him and all of the defendants herein, he attempted to dismiss said action in so far as the same concerned the said defendants, The G. H. Hammond Company and the Joseph Schlitz Brewing Company, and thereupon the court entered an order of dismissal. Plaintiff in error avers that said agreement between plaintiff and the defendants and the said attempt of dismissal by the court of common pleas, was without force and effect, since at the time when said agreement was made and said dismissal was entered, said court was wholly without jurisdiction to entertain this case.

Plaintiff in error says that any stipulations made after said petition and bond for removal were filed, were wholly without authority in law and not binding upon this plaintiff or either of the defendants.

Plaintiff in error says that it is not true and he denies that he and the other parties to said action abandoned and waived the right to complain of the jurisdiction of the court of common pleas of Lucas county, or the jurisdiction of this court.

Plaintiff in error says that there is error in the record presented by him to this court, and denies the averment of said answer to the effect that no error is presented.

Wherefore, plaintiff in error prays that the judgment of
207 the court of common pleas may be reversed as prayed for in his petition in error.

PETER ANDERSON,
By C. A. THATCHER,
RHEA P. CARY,
His Attorneys.

(Verification Omitted.)

* * * * * * *

Circuit Court of Lucas County, Ohio.

(Caption Omitted.)

Motion.

(Filed Oct. 10, 1906.)

Now comes the defendants in error, other than the George H. Hammond Company and the Joseph Schlitz Brewing Company, and the Connecticut Mutual Life Insurance Company, and severally move the court for an order directing the alleged copy of bond attached to the reply to answer to the petition in error filed herein, stricken from said reply and from the files herein.

By KING & TRACY,
C. W. EVERETT,
O. B. SNIDER AND OTHERS,
Attorneys for Said Defendants in Error.

208 Circuit Court of Lucas County, Ohio, September Term, 1906.

Parker, Hayes, Wildman, JJ.

(Caption Omitted.)

(No. 2068.)

Bill of Exceptions.

(Filed Nov. 3, 1906.)

We, the undersigned, attorneys for the several defendants in error in this case, hereby acknowledge receipt of the notice of the filing of this bill of exceptions, and acknowledge that the same is correct and consent that the court may forthwith allow and sign the same.

Be it remembered that heretofore, on October 8th, 1906, came the said parties, in person and by their attorneys, and the following proceedings were had in this court, to wit:

Thereupon this cause came on for hearing upon the motion of the plaintiff in error suggesting a diminution of the record; and for an order upon the clerk of the court of common pleas to transmit and file in this court the original or certified copy of the bond of the G. H. Hammond Company, which the plaintiff in error claims was filed in the common pleas court with the petition for removal filed by the said The G. H. Hammond Company. In support of said motion the plaintiff in error offered in evidence Exhibit No. 1, hereto attached and made a part hereof; to which the defendants in error objected. The objection was sustained by the court; to which action of the court, the plaintiff in error duly excepted.

Thereupon the plaintiff in error offered in evidence in support of said motion, the original petition in error filed by the G. H. Hammond Company, and also a certified copy of said petition in
209 error; to the admission of which the defendants in error objected; the objection was sustained by the court to which the plaintiff in error duly excepted. A copy of said original petition in error, by agreement of parties, instead of the original, is hereto attached marked Exhibit No. 2, in lieu of said original petition.

Thereupon the court overruled said motion of plaintiff in error suggesting a diminution of the record and praying for an order directing the clerk to file the said original bond or certified copy thereof; to which action of the court, the plaintiff in error duly excepted.

It was stipulated in open court, by and between all parties in the above entitled proceedings in error, that the plaintiff in error will file a reply to the answer to the petition in error herein, on Tuesday morning, October 9th, 1906, and that at said time any evidence which either party may desire to offer upon the issues of fact joined with respect to the jurisdiction of this court shall then be offered subject to all proper objections and exceptions on the part of either party.

(Adjournment.)

(OCTOBER 9TH, 1906.)

On motion of the defendant in error, the exhibit attached to the reply of the plaintiff in error was detached from the said reply, to which the plaintiff in error at the time excepted. (Said exhibit which was detached from the reply is Exhibit No. 1, which is hereto attached and made a part of this bill of exceptions.)

Thereupon this cause came on for hearing upon the petition of the plaintiff in error, the joint answer thereto filed by the defendants in error, the United Realty Company, Rosewell E. Messinger and Charles R. Messinger, which answer by agreement of all parties hereto, the court treated as an answer of each and all the defendants in error, and the reply of the plaintiff in error to said answer shall

be treated as a reply to the answer of each and all the defendants in error.

210 Mr. EVERETT (Attorney for defendants in error): We are ready to proceed; we do not wish to offer any evidence; we have no evidence to offer to sustain our answer; the records that exist in this court and the admissions of the reply contain all the facts; enough appears in the record of the case.

Thereupon the plaintiff in error to support the issue upon his part, called as a witness, one, ALBERT W. PAYNE, who, being first duly sworn herein, testified as follows:

Direct examination by Mr. THATCHER:

Q. You may give your name to the court and state your position.

A. Albert W. Payne, deputy clerk of the common pleas and circuit courts of Lucas county, Ohio.

Q. How long have you held that position?

A. About six years.

Q. I will ask you to produce a bond filed by the G. H. Hammond Company in this case on petition for removal.

Mr. EVERETT: I object to that question; I do not object because it is leading however alone—I object on that ground, among others.

The COURT: The objection will be sustained because it assumes the existence of a fact in controversy and that should not be done.

Mr. THATCHER:

Q. You may state, Mr. Payne, what paper you hold in your hand.

Mr. EVERETT: I object. I apprehend the certified copy will speak for itself, if it is material to prove it.

The COURT:

Q. Mr. Payne, the paper you hold in your hand is a paper from the clerk's office, it is a paper that was filed in the clerk's office in this case?

A. It is in the case of Anderson v. The United Realty Company.

The COURT: Isn't that sufficient identification of the paper, that it is a paper filed in the case?

211 Mr. THATCHER: I want to show where it has been since it was filed.

The COURT: You may show that.

Mr. THATCHER:

Q. Where has this paper been since it was filed in your office?

Mr. EVERETT: I want to put in an objection right at this stage that we do not say anything about any bond in our answer.

The COURT: I do not think we have come to the question yet; he may answer the question.

Defendants except.

A. It has been in the bond box in the vault.

Mr. THATCHER: How long has it been in your possession?
The COURT: That appears; that has been answered.

Mr. THATCHER:

Q. Where are all bonds of this character kept?

(Objected to.)
The COURT: We do not know anything about the character of the paper. It is not before the court yet.
Mr. THATCHER: I will offer the paper in evidence.
(Objected to.)
The COURT: Now we will look at the paper that you offer and see what it is (here court examines paper). The objection will be sustained.
Mr. THATCHER: I first offer the original bond.
(Objected to; objection sustained; plaintiff in error excepts.)
By agreemnt of counsel for all the parties hereto, a copy of said original paper—in lieu of the original—is hereto attached and made a part of this bill of exceptions, marked Exhibit No. 1.
Mr. THATCHER: Now I offer a certified copy of the bond.
(Objected to; objection sustained; plaintiff in error excepts.)
(Said certified copy of bond is hereto attached and made a part hereof marked Exhibit No. 1.)

Mr. THATCHER:

Q. Mr. Payne, I will show you a paper on the back of
212 which is endorsed the words "petition of the G. H. Hammond Company for removal," state where that——

Mr. EVERETT: We admit this is the original petition that was filed in the clerk's office.
Mr. THATCHER: We offer it in evidence.
Mr. EVERETT: Of course it is in evidence—we object to it—the offer of proof—the whole business is here for the purposes of error.
The COURT: The objection will be sustained.
Plaintiff in error excepted.
A copy of the said petition for removal is hereto attached and made a part hereof, marked Exhibit No. 2 (by agreement of counsel for all the parties hereto a copy of said petition is attached instead of the original.)

Mr. THATCHER:

Q. Now Mr. Payne, speaking of this original bond of the G. H. Hammond Company, has that been filed in any courts—has that bond been filed?

The COURT: We do not know anything about any original bond; the court has not admitted any proof of that.

Mr. THATCHER:

Q. The one in your hands, is that the original bond filed by the G. H. Hammond Company in the court of common pleas in this case?

(Objected to; objection sustained; plaintiff in error excepted and offered to prove that it is.)

Q. Where has that original bond been since it was filed, originally filed, with the clerk of the court of common pleas?

(Objected to and withdrawn.)

Mr. THATCHER:

Q. Was this record prepared in your court?

(Objected to.)

Q. By whom was the record of this proceeding in error prepared?

(Objected to on the ground that it is incompetent, irrelevant and immaterial.)

The COURT: What do you mean by the record?

213 Mr. THATCHER: This bill of exceptions and the papers filed in this court?

The COURT: You have offered the pleadings; you do not seek to prove who prepared those pleadings.

Mr. THATCHER: Oh, no.

The COURT: Do you want to show who bunched the papers together, attached them to the petition in error?

Mr. THATCHER: We want to show where it was these papers, these files we now find, these originals really in this court with this petition here, how and where the originals,—whether all the originals are attached and why, if all the originals are not attached.

The COURT: You want to find out who made up that petition in error by attaching the papers to the petition in error, attaching the original papers, is that it?

Mr. THATCHER: Yes, your honors.

The COURT: In order to make up the petition in error, the proceedings in error?

Mr. THATCHER: Yes, the record attached to the petition in error, I want to show,—my position being purely that this transcript and papers attached to the petition in error was prepared by the clerk. (Objected to.) We offer to show that the clerk was requested to make up a transcript of these proceedings by the plaintiff in this case; that he proceeded to do so; that the original bond was kept in the vault, with papers of that character, where all papers of that character are preserved; that by a clerical error he failed to make a copy of the same and attach it with the other papers in this case,—by the original bond is meant the bond for removal filed by the G. H. Hammond Company in the court of common pleas, which was offered in evidence heretofore.

Q. Is it the practice, has it been the practice the last six years when bonds are filed in any case in the court of common pleas and the case is carried to the circuit court on error or appeal, to attach the original bond or preserve the original in the vault of the clerk?

Question objected to by defendant's counsel. Objection sustained,

as stated by the court on the ground that it is immaterial.
214 Plaintiff in error excepted and offered to prove that it has been the practice and custom of the office of the clerk of the common pleas court and of the circuit court not to attach bonds filed in proceedings in the common pleas court, to the records made for the circuit court; but that the same are treated as filed in the circuit court and copies substituted.

Mr. THATCHER: That is all.

No cross-examination.

The above and foregoing is all of the evidence offered and received by either party on the hearing of this case upon the motion of the plaintiff in error suggesting a diminution of the record, and asking for an order directing the clerk of the common pleas court to file in this court the original or a certified copy of the bond for removal of the G. H. Hammond Company; and also upon the issues joined upon the petition in error, the answer of the several defendants in error and the reply of the plaintiff in error.

Thereupon this cause was argued by counsel and submitted to the court.

And thereafter, and within forty days of the overruling of plaintiff's motion suggesting a diminution of the record, and within forty days of the action of the court in refusing to admit the evidence offered by plaintiff in error; and within forty days of the commission of the several errors hereinbefore complained of, plaintiff in error reduced his exceptions taken in the hearing of this case to writing in this, his bill of exceptions and filed the same with the clerk of this court on the — day of November, 1906. And said clerk did forthwith on the — day of November, 1906, notify in writing the attorneys of the several defendants of the filing of this bill of exceptions herein. And the said clerk did on the — day of November, 1906, transmit this bill of exceptions to the Honorable Robert S. Parker, Honorable George R. Haynes, and Honorable Samuel A. Wildman, judges of the circuit court of Lucas
215 county, together with any and all objections and amendments filed thereto.

Thereupon on the 15th day of November, 1906, said court did endorse, settle, allow and sign said bill of exceptions and ordered the same to be made a part of the record of this case; and did immediately transmit said bill of exceptions to the office of the clerk of the circuit court of Lucas county, Ohio.

Witness our signatures this 15th day of November, 1906.

GEO. R. HAYNES,
R. S. PARKER,
S. A. WILDMAN,
Judges of the Circuit Court of Lucas County, Ohio.

Common Pleas Court of Lucas County, Ohio.

No. 53924.

(Caption Omitted.)

EXHIBIT No. 1.

Bond for Removal.

Know all men by these presents that we, the G. H. Hammond Company as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Peter Anderson in the penal sum of five hundred dollars ($500.00), for the payment whereof well and truly to be made unto the said Peter Anderson, his heirs, representatives and assigns, we bind ourselves, our heirs, representatives, successors and assigns jointly and firmly by these presents.

Upon condition, nevertheless, that whereas the said The G. H. Hammond Company has filed its petition in the court of common pleas of Lucas county, Ohio, for the removal of a certain cause therein pending, wherein the said Peter Anderson is plaintiff and the said The G. H. Hammond — is a defendant, to the circuit court of the United States for the northern district of Ohio.

216 Now if the said The G. H. Hammond Company shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and virtue.

In witness whereof, we have hereunto set our hands and seals this 25th day of August, 1905.

THE G. H. HAMMOND COMPANY,

[SEAL.] By E. W. KELSEY, *Manager.*

FIDELITY & DEPOSIT CO. OF MARYLAND,

By CHARLES F. CHAPMAN, JR.,
Attorney in Fact.

Attest:

PHILIP E. UHL, *Agent.*

(Verification Omitted.)

Common Pleas Court of Lucas County, Ohio.

(Caption Omitted.)

EXHIBIT No. 2.

Petition for Removal to the Circuit Court of the United States for the Northern District of Ohio.

Your petitioner, the G. H. Hammond Company, respectfully shows to this honorable court that it is one of the defendants in this suit, which is of a civil nature, and that the amount in dispute between plaintiff and this defendant exceeds the sum or value of two thousand dollars, exclusive of interest and costs.

Your petitioner further shows to the court that there is in said suit a controversy which is wholly between citizens of different states, and which can be fully determined as between them,
217 to wit, a separable controversy wholly between your petitioner and the plaintiff relating to the ownership and right to possession of the real estate described as lot 332 in Port Lawrence division, Toledo, Lucas county, Ohio, and the rents and profits of the same.

That your petitioner, the G. H. Hammond Company, was when this suit was begun and still is a corporation duly organized and existing under the laws of Michigan, and was at and prior to the commencement of this action and still is a citizen and resident of the city of Detroit, and the state of Michigan, and not a resident of Ohio. That the plaintiff was, at the time this suit was commenced, and still is, a citizen and resident of the state of Tennessee.

That the value of the real estate above described, which is in controversy between the plaintiff and this defendant exceeded when this suit was begun and still exceeds the sum of $2,000.00, exclusive of interest and costs.

That your petitioner claims to own and is in exclusive possession of the real estate above described, and none of the other defendant is *in*, or has been since September 15th, 1902, in possession of any part thereof, nor have they or any of them received any of the rents, issues or profits thereof. Your petitioner is not and has not been since September 15th, 1902, in possession of any of the other parcels of real estate described in the petition and has not received any of the rents, issues or profits thereof.

That your petitioner desires to remove this suit before the trial thereof into the next circuit court of the United States to be held in the northern district of Ohio, western division.

And your petitioner offers herewith a bond with good and sufficient surety for its entering in the circuit court of the United States for the northern district of Ohio, on the first day of its next session,

a copy of the record in this suit, and for paying all costs that may be awarded by the said circuit court of the United States,
218–224 if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner therefore prays that said surety and bond may be accepted; and that said suit may be removed into the next circuit court of the United States to be held in the northern district of Ohio, pursuant to the statutes in such case made and provided, and that no further proceedings be had herein in this court.

THE G. H. HAMMOND COMPANY,
By BROUGH & EMERY, *Its Attorneys.*

(Verification Omitted.)

* * * * * * *

225 *Argument for Plaintiff in Error.*

ANDERSON
v.
THE UNITED REALTY COMPANY et al.

Removal of suit from state to federal court—Party procures withdrawal of petition—And prosecutes action in state court—Under agreement—Objection to jurisdiction cannot be made, when—Devise to son, and if he dies without lineal descendants, etc., then over—Not sufficient to create estate in lineal descendants—Son takes a fee defeasible—Law of wills.

1. Upon the filing in a state court of the requisite petition and bond for the removal of the suit to a federal court, the state court is divested of jurisdiction; but a party who procures the withdrawal of the petition and bond, by the party who filed it, before any action in the federal court, and then dismisses his action in the state court as to the party who filed the petition for removal, and by agreement with the remaining parties prosecutes the suit in the state court, cannot be heard, after judgment against him, to assert that the jurisdiction of the state court had not been restored.
2. Where, in a will, there is a devise to a son, and if he dies without lineal descendants, living at the time of his decease, then over, these words are not, by themselves, without assistance from other parts of the will, sufficient to create an estate by implication in the lineal descendants, but the son takes a fee defeasible upon his death without lineal descendants, living at the time of his decease, and in the event of lineal descendants living at the time of the son's decease his fee becomes absolute and such descendants have no interest under the will as against his grantee.

(No. 10689—Decided November 10, 1908.)

Error to the Circuit Court of Lucas County.

Mr. Rhea P. Cary; Mr. C. A. Thatcher and Mr. C. H. Trimble, for plaintiff in error.

Messrs. King, Tracy, Chapman & Welles; Mr. George A. Bassett; Mr. Oliver B. Snider; Mr. Rathbun Fuller; Mr. Elmed E. Davis; Messrs. Rhoades & Rhoades and Mr. Clayton W. Everett, for defendants in error.

226 *Opinion of the Court.*

SUMMERS, *J.:*

In the Court of Common Pleas of Lucas County this was an action by Peter Anderson against several defendants to recover the possession of several city lots, or parcels of real estate in the city of Toledo.

The title of Peter Anderson to the lands in question depends upon the construction to be given to his grandfather, Henry Anderson's will. Henry Anderson, the grandfather, made his will on February 28, 1846, and died on the third day of April following. He left two children only, William born February 12, 1828, and James H. born June 25, 1831. William died in 1850 intestate, unmarried and without issue. James H. the other son, died in 1902, intestate and left surviving him as his only child, and only heir at law, the plaintiff, Peter Anderson, who was born August 27, 1859, and he is the grandson and the only grandchild, and only living descendant of the said Henry Anderson.

The testator gave all of his property, both real and personal, to certain persons in trust, and the will then reads as follows:

"Item. It is my will that when my son William arrives at the age of twenty-one years the trustees of the first and general trust shall deliver to him a settlement of the affairs of the trust, and if my debts are then paid, and as soon as that takes place, they shall put
227 him in possession of one-half of my property, reserving there out two-fifths parts of said moiety by valuation, which my said trustees shall hold in trust and properly invest and pay over to him at the age of twenty-five years. If my interest in the American Land Company be not brought into the general trust at the time William becomes twenty-one, but is brought in at any time before he arrives at twenty-five, so soon as brought in, two-fifths shall be deducted therefrom and invested and paid over to him at twenty-five, the other three-fifths he shall have as soon as paid in. I find the above does not express my will in this: When I say two-fifths shall be deducted from the interest I may have in the land company for investment, and three-fifths to be paid to him, I mean two-fifths of a moiety shall be deducted and three-fifths of a moiety paid over.

"And it is my will that my said trustees hold and invest and pay over the remaining moiety of my estate to my son James at the respective periods of twenty-one and twenty-five years of age, being

governed as to the amounts to be paid at each of the respective periods by the same rules and directions as are above laid down in the bequest to William, and to be governed in all other respects by the regulations laid down concerning the same.

"If either of my sons die without lineal descendants, the one surviving shall take his estate above bequeathed, and, if the survivor dies without lineal descendants, then one-half both of the decedent's original portion, as well as one-half of the portion taken by
228 survivorship, shall go to my brother Peter, the other half to such of my brothers and sisters as may be living at the time of the death of such surviving son. If my brother Peter be not living at the time of the death of my surviving son, so dying without lineal descendants, then the share he would have taken, if living, shall go to his children living at the time of the decease of my said son, and if there be no children surviving, then the share shall go to my other brother and sisters surviving at the time of such decease of my son. I make the following explanation: The limitation over on the death of my surviving son without lineal descendants is intended to take effect if there be no lineal descendants living at the time of the decease of such son. Nothing in the foregoing will shall be construed as to deprive either of my sons disposing of their portions by will on their attaining the age of twenty-one years, respectively. The above limitations over shall give way to the provisions of such wills."

This will was duly probated in Mississippi, and an authenticated copy of the will and of the probate thereof *were* thereafter duly filed in the Probate Court of Lucas County, Ohio, where the will was duly admitted to probate and record as a will from another state.

On April 7, 1860, James H. Anderson, the father of the plaintiff, and the then surviving son of the testator, executed and delivered to one Charles Butler a quit claim deed of all the real estate involved in this action, which deed was duly signed, sealed, acknowledged and executed by him in the presence of two witnesses who signed
229 the deed as such, and which deed was duly recorded in the Recorder's Office of Lucas County, Ohio, on May 3, 1860.

The defendants derive their title from Charles Butler. In 1838 the land in controversy was owned in fee simple by one Edward Bissell, who then mortgaged it to Charles Butler to secure the payment of his bond for a large sum due in one year. In 1841 Butler assigned the bond and mortgage to Henry Anderson as collateral security for the payment of his note to Anderson, and, in default of payment, Anderson in 1843 filed his bill in chancery in the Court of Common Pleas of Lucas County, Ohio, to foreclose the Bissell mortgage. The land was bid in by Anderson at the master's sale in 1844 and he received the deed therefor. He then entered into an agreement with Butler which in effect, so it is contended, made the land the property of Butler and vested the title in Anderson merely as security for the payment of Butler's note to Anderson. Butler thereafter obtained quit claim deeds from Bissell and from Anderson's trustees and from William and James H. Anderson, and it is also contended that the proof shows that the payments made by

Butler to Henry Anderson and to his trustees discharged the note, but it is not necessary to narrate the facts in detail, for if the title was in James H. Anderson his quit claim deed conveyed it to Butler, and it did not descend from James H. Anderson to his son, the plaintiff, and these facts become material only in the event the plaintiff took an estate in the land under his grandfather's will. The
230 facts are set out in detail in the opinion of the circuit court, 9 C. C., N. S., 473.

The petition in this case was filed August 17, 1905. The defendants were not tenants in common, but each held a lot in severalty. Some of the defendants by answer objected to the petition on the ground that separate causes of action against several defendants were improperly joined, and on August 25, 1905, one of the defendants, a corporation, filed its petition and bond for removal into the next circuit court of the United States to be held in the northern district of Ohio, western division. The petition for removal averred that the corporation was the owner and in exclusive possession of one of the lots, that it had no interest in any of the other lots and that none of the other defendants had any interest in its lot, that the corporation was a citizen of Michigan, that plaintiff was a citizen of Tennessee, and that the controversy in said suit between the corporation and the plaintiff was a separable controversy, wholly between it and the plaintiff, relating to the ownership and right to possession of the real estate described as lot 332 in Port Lawrence Division, Toledo, Ohio, and the rents and profits to the same, and that the value of the real estate in controversy, exclusive of interest and costs, exceeded the sum of two thousand dollars. The transcript does not show any action by the court upon the petition for removal or upon the bond, but it does appear that on the sixth of November, 1905, the plaintiff dismissed his action, without prejudice, as to that defendant, and that in consideration thereof such defendant
231 withdrew, its petition for removal, and on the same date there is this docket entry, "Petition for removal withdrawn." The action was dismissed also as to some other defendants. Thereafter, on January 2, 1906, the plaintiff and the remaining defendants entered into a stipulation that the defendants waived the misjoinder of causes of action in the plaintiff's petition and that all the parties consented and agreed to try together all of the causes of action set forth in the petition. Thereafter the action was tried in the court of common pleas and a verdict was directed for the defendants and each of them and the petition was dismissed. On July 14, 1906, the plaintiff filed a petition in error in the circuit court and assigned as his first ground of error, that the common pleas court lost jurisdiction of the action with the filing of the petition and bond for removal. Other errors are assigned. The circuit court affirmed the judgment of the court of common pleas and the case is brought here on error to reverse the judgments of the lower courts.

Upon the filing of such petition and bond the federal statute makes it the duty of the state court to accept them and to proceed no further in the suit. Thereupon the state court is divested of jurisdiction of the suit and its subsequent orders are *coram non*

judice, unless its jurisdiction be restored. Railroad Company v. Koontz, 104 U. S., 5; Steamship Company v. Tugman, 106 U. S., 118; Madisonville Traction Company v. St. Bernard Mining Company, 196 U. S., 239. In this case we think the jurisdiction was restored as to the remaining defendants, by the withdrawal of
232 the petition for removal by the defendant that filed it and the dismissal by the plaintiff of his action against that defendant, before any action upon the petition and bond had been taken in either court. The state court had jurisdiction of the subject matter and of the parties, but under the Federal Constitution and laws it was the privilege of one of the defendants to have the suit transferred to a federal court, and when he filed the requisite petition and bond the jurisdiction of the state court was suspended. The federal court could with the consent of the parties restore the jurisdiction by remanding the suit, and we see no good reason why the jurisdiction of the state court may not be restored by the withdrawal of the petition for removal before any action upon it has been taken. In the federal court, to which the case was sought to be removed, on the ground of an alleged separate cause of action against one of the defendants, it would be, as a matter of course, remanded to the state court upon the entry of discontinuance as to him (Texas Transportation Co. v. Seeligson, Admr., 122 U. S., 519), or upon a settlement of the controversy between him and the plaintiff, Torrence v. Shedd, 144 U. S., 527. There was merely an irregularity in the mode of restoring the jurisdiction, of which the plaintiff will not be heard to complain. In Garrozi v. Dastas, 204 U. S., 64-72, Mr. Justice White says: "The assertion of the want of jurisdiction in the court below rests, however, not upon a denial of power in that court to have entertained the controversy if the suit had been originally brought there, but upon the contention that, as a defendant other than the husband was a resident and citizen of Porto Rico, the cause was improperly removed from the local court. And the proposition goes to the extent of insisting that such want of jurisdiction may be asserted by the person who procured the removal, who resisted the effort to remand, and when the want of jurisdiction is only suggested after trial and final decree." And the conclusion was that even though the removal was ir-
233 regular, the party who caused the removal could not be heard, after judgment against him, to assert that the United States court was wanting in jurisdiction solely on the ground that the case was erroneously removed. And if the conclusion in Baltimore & Ohio Rd. Co. v. Fulton, Admr., 59 Ohio St., 575, that where a suit is removed to the federal court and then dismissed without trial, no subsequent suit upon the same cause of action can properly be brought in the state court, is not correct, as seems to be the opinion in Gassman v. Jarvis, 100 Fed. Rep., 146 (And see note to Young v. Bell Telephone & Telegraph Co., 7 L. R. A., N. S., 501, where the cases are collected; 75 S. Car., 326), then, in effect, the withdrawal of the petition and bond for removal and the trial of the suit in the state court by agreement of all the parties was the prosecution of a new suit upon the same cause of action.

The remaining question, what estate did the plaintiff take under

the will, would not, perhaps, have consumed much time, for the leading text-books and the cases are in accord that he took none, had not the circuit court of appeals reached a different conclusion in Anderson v. Messinger, 146 Fed. Rep., 929, where the same will was construed. It is there held that James H. Anderson, the surviving son, took a life estate, with the remainder to his son, Peter Anderson, the plaintiff. In Underhill on the Law on Wills, Section 468, it is said: "Where real or personal property is given to a person *absolutely,* but if he should die *without leaving children then over,* the primary devisee takes a common-law fee conditional, which is defeasible on his death without leaving children, though
234 the children, if he leave any, take no estate as purchasers under the will *by implication.* If the first taker shall die leaving children him surviving, by which event the remainder is defeated, they will take by descent from their parent and not as purchasers under the will. He has an estate in fee with full power of disposal, and the only effect of mentioning the children in the will is to indicate the contingency upon which his estate in fee is to be defeated."

At common law it was settled, says Mr. Jarman (Jarman on Wills, *521, 6th Edition), that a devise to a person indefinitely, with a limitation over in case he died without issue, or words of similar import, conferred an estate tail on such person, and on the ulterior devisee a remainder in fee expectant on the estate tail in such prior devisee, on the ground that, by postponing the ulterior devise until the failure of the issue of the prior devisee, the testator afforded an irresistible inference that he intended that the estate to be taken by the prior devisee under the indefinite devise should be of such a measure and duration as to fill up the chasm in the disposition, and prevent the failure of the ulterior devise, which, as an executory devise to take effect on the general failure of issue, would be void for remoteness.

And in like case, where there was an express estate for life in the first taker, he was held to take an estate tail. In Stanley v. Lennard, 1 Eden's Chancery Reports, 87-95, the Lord Keeper said: "Where a man, by his will, makes one tenant for life, with remainder to one, two, three, four, five, etc., of the issue of the tenant
235 for life, and then, for want of issue of tenant for life, limits the estate over, this will be an estate tail in the first taker for life by necessary implication; and this, because of the word 'then' before the limitation over, which, though sometimes an adverb of time, yet is sometimes a word of relation, and signifies as much as 'in such case,' and must have this effect, that upon the first, second, third, fourth, fifth, etc., limitations failing, the remainder-man could not take it, because of the words, for want of issue; and therefore, unless the tenant for life was construed to have an estate tail, it would descend, in the meantime, to the heir at law, because the contingency on which the remainder-man was to take had not happened. But as the testator certainly intended to dispose of his whole estate, it has been construed a necessary implication, that the tenant for life should take an estate tail to carry the testator's intent into execution. But where there is an express estate for

life, the court never enlarges this estate for the sake of the tenant for life himself, but merely for the sake of other persons who are intended to take by the will. To this it is objected that you will introduce an estate tail, which will give the party an opportunity of defeating the limitations over; but this proves too much; for so it happened in all the cases that have been cited at the bar; for you cannot supply the defect and omission in the will without giving the tenant for life power to destroy the remainders over."

This result follows from interpreting the words "die without issue" or words of similar import to mean an indefinite failure of issue. But in 1837 an act was passed (1 Vict., c. 26, s. 28,
236 29), by which it was provided that a devise of real estate without any words of limitation shall be construed to pass the fee simple, or other the whole estate and interest which the testator had power to dispose of by the will and "that in any devise or bequest of real or personal estate the words 'die without issue,' or 'die without living issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will." And so Mr. Jarman says (*525), "Under this clause, coupled with the preceding section, which makes a devise confer an estate in fee without words of inheritance, it will generally happen, in cases in which, according to the old law, the prior devisee would have been tenant in tail, by the effect of words devising over the property on the failure of his issue, that he will, under the new rule of construction, take an estate in fee simple, subject to an executory devise in the event of his dying without leaving issue at his death." And then speaking of the advantages attending the present mode of construction, he says (*523), "Secondly, that by excluding an implication of an estate tail in the person whose issue is so referred to, where he takes an estate under the will, or where he or the express devisee happens to be the heir at law of the testator, the new construction has the effect of exempting the
237 interest of the ulterior devisee from its liability to be defeated or destroyed by the act of the prior devisee; the result being, that instead of the ulterior devisee having (as formerly) a remainder in fee expectant on an estate tail in such prior devisee (which, of course, the latter might have barred by a disentailing assurance), he takes by executory devise engrafted on a preceding fee simple, to arise on the event of the first devise dying without leaving issue at his death, the estate of such prior devisee being absolute in the alternative event."

Now, the pertinency of this statement that, in such a case under the new rule of construction, the prior devisee takes an estate in fee simple, subject to an executory devise in the event of his dying without leaving issue at his death, is apparent when it is stated that in this state the common law rule never was adopted, but was re-

jected and the modern rule was adopted. Parish's Heirs v. Ferris et al., 6 Ohio St., 563; Niles et al. v. Gray et al., 12 Ohio St., 320.

Where there is a devise to A. for life and in case he should die without issue to B., it has been urged in case A. dies leaving issue, the issue take by implication on the ground that it would be absurd in the testator to make the estate of the ulterior devisee depend on the contingency of there not being issue, and yet, in the alternative event to give the property neither to A. himself nor to such issue, but to leave it to devolve to the heir at law or residuary devisee. Mr. Jarman says (*522), "There is, however, no authority for implying an estate in the issue living at the death, and the contrary conclusion is supported by Monypenny v. Dering, where it is
238 argued that a devise over in default of issue, A., a tenant for life, to some only of whose issue an estate was expressly given, showed that the intention must have been that not some only but all the issue should take; but Sir J. Wigram, V. C., said, that, admitting such to be the intention, it furnished no sufficient ground for supplying estates by purchase to the omitted issue. He had asked for but did not get any authority for such a proposition." It may be added that there is no such absurdity, for in cases of bequests for life, with gift over in default of children, it is held that the children do not take by implication.

In Jarman on Wills (*524), it is said: "As no implied estate to the issue arises (as we have seen) from a limitation over in case of the prior devisee or legatee dying without leaving issue at his decease, it should seem that there is the same absence of authorized ground for implying a gift to *children* from a similar limitation over in default of these objects.

"Accordingly, in several cases it has been considered that a bequest to a person, and if he shall die without having children, or without leaving children (which means without having had a child born, or without leaving a child living at his decease), then over, does not raise an implied gift in the children; but the parent takes an absolute interest, defeasible on his dying without having had, or without leaving, a child as the case may be. The rejection of the implication in such a case is not (as already pointed out) productive of any absurdity; for it supposes the testator, by mak-
239 ing the interest of the legatee indefeasible on his having or leaving a child, to intend that if there are children he shall have the means of providing for them.

"And even where the language of the will necessarily confines the interest of the parent to his life, the children will not generally be held to take by implication; it is extremely probable that the testator intended a benefit to them; but *si voluit non dixit.*"

Before the making of this will an act was passed (March 3, 1834, 1 Curwen, 145, now Section 5970, Revised Statutes), which declared that in any will thereafter made, a devise of lands shall be construed to be a fee simple; "and the devisee shall take, all the estate which the deviser had in the property or thing divested, unless it appears by express words the manifest intent that a lesser estate was intended." And before the passage of this act it had been decided by

this court that words of inheritance are not necessary in a will to pass an estate in fee simple. So that Henry Anderson, by the direction in his will to his trustees to put his son William, when he arrived at the age of twenty-one years, in possession of one-half of his property, excepting two-fifths part of said moiety, which they shall pay over to him at the age of twenty-five years, and by a similar direction as to his son James, vested in them a fee simple title of all the estate he had in real property, unless it appears by express words or manifest intent that a lesser estate was intended. There are no express words, unless the son died without lineal descendants living at the time of his decease, which was not
240 the event at the decease of the surviving son James. But it is contended that by making the limitation over contingent upon the death of the son without lineal descendants, living at the time of his decease, the testator manifested an intention that the son, in the event he died with lineal descendants living at the time of his decease, should take only an estate for life and that the lineal descendants should take a remainder. The answer to this is that it is settled, as already shown, that the limitation over in the event of non-existence of lineal descendants does not of itself imply a devise to the lineal descendants. The alternative of the devise over is an indefeasible estate in the son. To say that the testator must have intended the grandchildren to take is merely conjecture. The testator may have supposed that the son's children would inherit the son's property, or that the son would give it to them; this is the most that can be implied from his mention of them, and if he acted upon that belief and, after the devise of his property to the sons, attempted to provide only for the contingency of their death without surviving lineal descendants, then not only can it not be said that he intended to devise it to grandchildren, but a reason for his not doing so is apparent.

In this will not only is there nothing from which to imply an estate in grandchildren but such an implication is precluded by the explanations of the testator. He says: "Nothing in the foregoing will shall be construed as to deprive either of my sons disposing of their portions by will on their attaining the age of twenty-
241 one years, respectively. The above limitations over shall give way to the provision of such wills."

This is not the gift to the sons of a power to dispose of the estate by will. In the contemplation of the testator that power they already had upon attaining the age of twenty-one years for he says they are not to be *deprived* of it. If it be said that this explanation merely qualifies the limitation over, then it does not help the plaintiff, and if taken literally, then the sons upon attaining the age of twenty-one years could dispose of their estates by will even though they had children, which is inconsistent with an intention of the testator to make the grandchildren objects of *his* bounty. The evident intention of the testator was to give his sons absolute estates to be divested only in case they died without issue living at the time of their decease and without having disposed of the estate by will.

In Dowling v. Dowling, L. R., 1 Ch. App., 615, the testator directed that the interest from his residuary estate should be divided half yearly between his four sons, "and at the decease of either without lawful issue such share to revert to the remainder then living, or their child or children." Stuart, V. C., held that the sons took only a life estate, and that the children took a remainder by implication, but on appeal (Dowling v. Dowling, 1 Ch. App. Ca., 612), his decree was overruled and it was held, "That each of the four sons took an absolute interest in his share subject to be divested in case of his dying without leaving issue; and that there was no gift by implication to the children of any who might die
242 leaving issue." In the opinion, Turner, L. J., says (615), "There is, therefore, in my opinion, an absolute gift to the sons; but this absolute gift is subject to this condition, that upon the death of either of them without issue, the share is to revert to the remainder then living or their child or children. It appears to me, upon the construction of the whole will, that the children were not to take any interest as against their parents. If the parents are out of the way, then the children are to take in their place; but so long as there are parents the children are to take nothing. The testator thought that in that case he had done enough for them, for the parents might provide for their own children."

In re Rawlins' Trusts, L. R., 45 Ch. Div., 299, it is held, "Where, in a will, there is a gift to A. for life, with a gift over 'on the death of A. without leaving children,' those words are not, by themselves, without assistance from other parts of the will, sufficient to create a gift by implication to the children."

This case went on appeal to the House of Lords where it was affirmed under the name of Scale v. Rawlins (1892), A. C., 342. There it was contended that the construction below led to an absurdity, and that either the niece took an absolute interest in fee simple in the houses, subject to defeasance if she left no children, or there was an implied gift to the children. Lord Halsbury, L. C., says: "It is manifest that taking either alternative proposition put forward by the appellants, this House, if it is called upon to give that effect to the instrument, must put words into the
243 will in order to do it. The thing has not been done; and I am not aware of any authority which would lead your Lordships to come to the conclusion that, because the testator had at some time or other the intention in his mind to give this property to the person in question, you are justified in saying that he has done so by the instrument which he has executed."

Again he says: "Then it is said that he intended to make a gift to the children. Again I say that he does not do so. I cannot say that he had not the intention, but all I can say is that he has not expressed it, and your Lordships cannot put in words simply because you may have some suspicion that in making his testamentary disposition that was the intention in his mind."

In Doe, ex dem. Barnfield et al. v. Wetton, 2 Bosanquet & Puller, 324, there was a devise to S. S., her heirs and assigns forever; but if she shall happen to die leaving no child or children lawful issue of

her body living at the time of her death, then to F. B. and his heirs, and it was held that the devise in fee to S. S. was not restrained by the subsequent words to an estate tail, and that the devise over to F. B. was a good executory devise. In the opinion, Lord Eldon, Ch. J., says: "It has been argued in this case, that it was manifestly the testator's intention, that the children and grandchildren of S. Saunders should be benefited. But however that may be, the question is, Whether the testator intended, that the children and grandchildren should be benefited by this will, or by some disposition to be made by S. Saunders, if she had any children living at the
244 time of her death, the estate being given to her in fee, she would have abundant power to provide both for children and grand-children. Nothing, however, is given to them by this will; they are merely named in the description of the contingency on which the estate is to go over."

In Den v. Snitcher, 14 N. J. L., 2 Green, 53, where there was a devise to a son and if he should die without issue, then at his decease. over, Hornblower, C. J., says (59): "It appears to me hardly possible that any intelligent mind, unembarrassed by technical rules and legal refinement, can entertain a doubt upon the plain reading of this will, that the testator *intended* his son Samuel should have the whole of the plantation in fee simple, in case he had issue, and that at all events, he should be the absolute and unconditional owner of one-half of it. He did not intend to give the estate to Samuel's issue; but he intended to give it to Samuel, if he had issue."

Again he says (60), referring to the statute of that state providing that a devise without the word "heirs" shall convey an estate in fee simple: "Let us then enquire, First, Did Joseph Copner devise to his son Samuel, any lands, etc., without using the words 'heirs and assigns?' He certainly did; and if he had stopped there, the whole plantation, under the influence of the act of Assembly, would have passed, in fee simple, to Samuel, the devisee.

"Secondly. Has the testator used any expressions to shew that he intended to give Samuel 'only an estate for life,' in all the lands devised to him? Or, to change the form of the interrogatory, has the testator used any expressions to shew, that he did not
245 intend, that Samuel should have a fee simple, in any part of the lands devised to him? I consider these questions of exactly the same import, for, since the act has declared that a devise to A., without words of perpetuity or inheritance, is a devise in fee simple, we must presume the testator used the words understandingly, and so intended to give the land in fee simple, unless he has used some expressions inconsistent with such intention, or qualifying the general gift, and shewing that he did not mean to give the devisee either the whole, or any part of the land in fee simple."

In Kinsella v. Caffrey, 11 Irish Ch. Rep., 154, the master of the rolls after reviewing a number of cases says: "I apprehend, therefore, that the authorities may be classed under three heads: First, where there is an indefinite bequest to the parent, and, if he die without having or leaving children, to B. In that case, it is clear that the

children do not take any interest by implication. Secondly, if there is a bequest to the parent for life, and, if he die without having or leaving children, to B.; if the parent dies leaving children, they are not entitled by implication. Thirdly, if however, in a case such as I have last mentioned, there are matters on the face of the will to raise an inference in favour of the children, the Court is at liberty to consider these circumstances in connection with the bequest over, in the event of the parent dying without having or leaving children, although such bequest over, by itself, is not sufficient to justify the Court inferring a gift in favour of the children." These rules of construction are expressly approved In re Rawlins' Trusts, *supra*.

246 The case of Shaw and Campbell v. Hoard et al., 18 Ohio St., 227, supports the contention of plaintiff, but it is contrary to the current of authorities and appears to have been disposed of without reference to any decisions and upon the conjecture that the testator supposed the property would descend to the children of the wife and daughter, and that this was sufficient to give it to them by implication. The case was decided in 1868, long after the making of the Anderson will, and so cannot be insisted upon as controlling the decision in this case. It is in conflict with other well considered decisions of this court. In Niles et al. v. Gray et al., 12 Ohio St., 320, where the testator gave real estate to his daughter, and provided that if she died without any legitimate heir, her part of the real estate should go to his eldest son, and the daughter had children and conveyed away the land, it was held, in a suit to quiet title by the grantees against the children, and in which the children claimed that the mother took only a life estate and they took a fee simple, that the mother took an estate in fee simple subject to be determined by the contingency of her dying without issue living at the time of her death, on the happening of which, the estate would pass over to the eldest son by way of executory devise. This case is followed and approved in cases decided subsequently to Shaw and Campbell v. Hoard. The judgment is affirmed.

Judgment affirmed.

Price, C. J., Shauck and Spear, JJ., concur. Davis, J., dissents.

247 *Dissenting Opinion.*

Davis, *J.*, dissenting: It seems to have been conceded at every stage of this case that Shaw v. Hoard, 18 Ohio St., 227, if adhered to would control the judgment in the present controversy; but the circuit court passed over it with the remark that it has been ignored if not substantially overruled in cases following Niles v. Gray, 12 Ohio St., 320. It is also stated in the conclusion of the majority opinion above that Shaw v. Hoard is in conflict with Niles v. Gray and subsequent cases which follow the latter. I have no difficulty in distinguishing, to my own satisfaction, Shaw v. Hoard from Niles v. Gray, and cognate cases. Indeed, it has always seemed to me that the distinction was very plainly indicated by the court itself, by

Scott, J., in Carter v. Reddish, 32 Ohio St., 1, as follows: "The English rule that a devise to A. and his heirs, followed by a devise over in case A. die without issue, will be cut down to a fee tail in A., and the word heirs be construed as meaning issue, is owing to the fact that in that country the words 'dying without issue' are construed as meaning *an indefinite failure of issue.* 2 Jar. on Wills, 301. In this state, however, it is well settled that the words 'dying without issue' import a dying without issue living at the death of the prior devisee. Parish's Heirs v. Ferris, 6 Ohio St., 563; Niles v. Gregory (misprint for Niles v. Gray), 12 Ohio St., 320. Still, we should have no hesitation in finding, from the language of the will before us, that the testator intended a life estate only for the first devisees, if the sole condition of the limitation over to the nephews and nieces had been
the dying of his children without issue; and without reference
248 to the time when they should so die. But such is not the
language of the will," etc. An examination of the cases referred to by Judge Scott, as well as the other decisions of this court relied on by the majority, will disclose the fact that he has stated the doctrine of this court with admirable precision and conciseness; and he cannot be presumed to have misunderstood the decisions to which he refers, for he participated in and concurred in both of them. And we will not underrate the authority of the distinction outlined in Carter v. Reddish, when we remember that the personnel of the court which made it was not one whit inferior to the highest standards of this court as to breadth of learning, depth of insight, sound discrimination and analytic power. And still, in Carter v. Reddish, notwithstanding those decisions, the court would have had "no hesitation in finding that the testator intended a life estate only for the first devisees," under conditions such as are found in Shaw v. Hoard and the case now at bar; but said that such conditions did not exist in Carter v. Reddish.

But I waive further elucidation of this proposition because from my point of view the question as to the nature of the estate devised by this will is merely academic. It is a matter of indifference whether it be a life estate or a determinable fee; because in either case the only power of disposition apparently intended by the testator, is by will, as provided in this clause: "Nothing in the foregoing
will shall be construed as to deprive either of my sons dis-
249 posing of their portions by will on their attaining the age of
twenty-one years respectively. *The above limitations over shall give way to the provisions of such wills.*" That is to say, the testator gives to his sons the power of appointment by will and except in that way only, the property devised cannot be diverted from the family line prescribed by the testator. Whether each of the sons took an estate for life with a contingent remainder over or a fee simple determinable on the happening of the contingency, he could not defeat the devolution of the property within the family, as prescribed by the testator, except by appointment in a will. I will not discuss this proposition further than to say that this clause of the will stands out as prominent as the Washington Monument and it cannot be ignored in any fair construction of the will.

The sons of the testator never executed the power of appointment by will. Charles Butler, from whom the defendants in error claim title, by a course of procedure which is, to say the least, very suspicious, obtained from one of them who had succeeded to the rights of the other, a quit-claim deed for a consideration of "one dollar and other considerations." This deed, as I think I have shown, he had no power to make, even if the transaction was free from fraud. Butler also, at or about the same time, procured from the executors of Henry Anderson a quit-claim upon a like expressed consideration in which it is recited that: "It being understood that the above described premises were conveyed to Henry Anderson in fee but held by him in his lifetime as a mortgage to secure the payment
250 of a certain sum of money due from Charles Butler and Henry Anderson, which fact, after his death, was duly acknowledged under seal by William Anderson and James H. Anderson, his only heirs at law," etc.

As I construe the will, neither the sons of the testator nor his executors and trustees had power to divert the estate by these deeds, and I am constrained to believe that they executed the deeds under mistake and misinformation as to both the law and the fact.

I will not unnecessarily consume space by making any argument of my own to show that not a remnant of title, legal or equitable, remained in Butler after Anderson bought the property at the master commissioner's sale, even after the agreement between Anderson and Butler on October 4, 1844. For brevity's sake I refer to the opinion in Anderson v. Messinger, by Severens, J., 146 Fed. Rep., 929. I might add something to that, but it would be fruitless.

251 Supreme Court of Ohio, Judiciary Building.

E. O. Randall, Reporter.

COLUMBUS, OHIO, *March Eight,* 1909.

I do hereby certify the foregoing to be a true and correct copy of the opinion of this Court in the case of Anderson v. The United Realty Co., as the same is on file in this office; but it is subject to revision and addition by the Judges, until published in the official reports.

[Seal of the Supreme Court of the State of Ohio.]

E. O. RANDALL,
Supreme Court Reporter.

252 UNITED STATES OF AMERICA,
Supreme Court of Ohio, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the

Seal of said Supreme Court, in the City of Columbus, Ohio, this 2nd day of April, A. D. 1909.

[Seal of the Supreme Court of the State of Ohio.]

JOHN S. McNUTT,
Clerk of Supreme Court of State of Ohio,
By SEBA H. MILLER, *Deputy.*

253 PETER ANDERSON, Plaintiff in Error,
vs.
THE UNITED REALTY COMPANY, THE DOW-SNELL COMPANY, JOHN P. Freeman, Charles R. Messinger, Rosewell E. Messinger, Aaron Chesbrough, Clarence M. Lamb, Edward H. Thompson, Mary E. Nearing, and The Joseph Schlitz Brewing Company, Defendants in Error.

To the Honorable W. B. Crewe, Chief Justice of the Supreme Court of the State of Ohio:

Comes your petitioner, Peter Anderson, and shows and represents to the Court that a certain cause wherein your said petitioner was plaintiff in error, and the said parties above named as defendants in error, were defendants in error, was lately, to-wit,—on the 10th day of November, 1908, decided by the Supreme Court of the State of Ohio against your petitioner.

Petitioner further shows and alleges that in said cause, it was made to appear that the suit was originally begun by your petitioner against the above named parties as defendants in error in the Court of Common Pleas of Lucas County, Ohio, on the 7th day of August, 1905; that in said suit, in addition to the other defendants above named, the G. H. Hammond Packing Company was in said Common Pleas Court a party defendant, and that said last named Company, in due time, filed its petition and bond to remove said cause to the Circuit Court of the United States for the Western Division of the Northern District of Ohio, upon the ground that there was in said suit a controversy wholly between your petitioner and the said G. H. Hammond Packing Company, and that said G. H. Hammond Packing Company and your petitioner were citizens of different states.

Petitioner is advised that the effect of the filing of this petition was to divest the said Court of Common Pleas of Lucas
254 County, Ohio, of all further jurisdiction to proceed in said suit.

Petitioner further shows and alleges that in said cause he made objection to the jurisdiction of the Circuit Court of Lucas County, Ohio, and of the Supreme Court of Ohio to decide the matters in controversy between him and the parties above named as defendants in error, upon the grounds stated.

This claim was denied by the said Circuit Court of Lucas County, Ohio, and by the Supreme Court of Ohio, which Courts, notwithstanding said claim, retained jurisdiction and decided said cause,—all of which will more fully appear by certified copy of the record

of the Supreme Court of Ohio, and of the opinion of said Court, which are herewith presented.

Petitioner further shows and alleges that the said Supreme Court of Ohio was and is the highest Court of said State to which said cause could be taken.

Wherefore, your petitioner prays for a writ of error directed to the Supreme Court of the State of Ohio to remove said cause into this, the Supreme Court of the United States, to review its action therein.

PETER ANDERSON,
By R. P. CARY, *His Attorneys.*

Allowed:

WILLIAM B. CREW,
Chief and Presiding Justice of the Supreme Court of Ohio, said Supreme Court of Ohio Being the Court of Last Resort in said State.

255 [Endorsed:] Filed Mar. 17, 1909. Supreme Court of Ohio. John S. McNutt, Clerk.

256 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Ohio before you, or some of you, being the highest court of law or equity of said state in which a decision could be had in the suit between Peter Anderson and the United Realty Company, The Dow-Snell Company, John P. Freeman, Charles R. Messinger, Rosewell E. Messinger, Aaron Chesbrough, Clarence M. Lamb, Edward H. Thompson, Mary E. Nearing and The Joseph Schlitz Brewing Company, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute or of an authority exercised under said state, on the ground of their being repugnant to the Constitution, the treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of said Constitution, treaty, statute or commission; a manifest error hath happened to the great damage of the said Peter Anderson as by his complaint appears. We being willing that error, if any hath been,
257 should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly you send the record and proceedings aforesaid, with all

things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 15th day of April next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, The Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 17th day of March in the year of our Lord, one thousand nine hundred and nine.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. E. DILLEY,
Clerk U. S. Circuit Court, S. D. O.

Allowed:

WILLIAM B. CREW,
Chief and Presiding Justice of the Supreme Court of Ohio, said Supreme Court of Ohio Being the Court of Last Resort in said State.

258 [Endorsed:] Filed Mar. 17, 1909. Supreme Court of Ohio. John S. McNutt, Clerk.

259 PETER ANDERSON, Plaintiff in Error,
vs.
THE UNITED REALTY CO., THE DOW-SNELL CO., JOHN P. FREEMAN, Charles R. Messinger, Rosewell E. Messinger, Aaron Chesbrough, Clarence M. Lamb, Edward H. Thompson, Mary E. Nearing, and The Joseph Schlitz Brewing Company, Defendants in Error.

Assignment of Error.

Now comes the plaintiff in error, and assigns for error in the above styled case the action of the Supreme Court of the State of Ohio in not reversing the judgments of the lower Courts therein, and in refusing to hold that said lower Courts had no jurisdiction thereof for the reason that the same was and is in the Circuit Court of the United States for the Northern District of Ohio, Western Division.

PETER ANDERSON,
By R. P. CARY,
His Attorney.

260–264 [Endorsed:] In the Supreme Court of Ohio. No. —. Peter Anderson vs. The United Realty Co. et al. Assignment of Error. Filed Mar. 17, 1909. Supreme Court of Ohio, John S. McNutt, Clerk.

* * * * * * *

265 Know all men by these presents, that we, Peter Anderson as Principal and The United States Fidelity & Guaranty Co., as Surety, are held and firmly bound unto The United Realty Company, The Dow-Snell Company, John P. Freeman, Charles R. Messinger, Rosewell E. Messinger, Aaron Chesbrough, Clarence M. Lamb, Edward H. Thompson, Mary E. Nearing and The Joseph Schlitz Brewing Company, in the full and just sum of Five Hundred ($500.00) Dollars, to be paid to the said parties last above named, their attorneys, administrators and assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this the 17th day of March, 1909.

Whereas, lately in a suit depending in the Supreme Court of the State of Ohio, between Peter Anderson as Plaintiff in Error and the obligees herein mentioned as defendants in error, a judgment was rendered against the said plaintiff in error, and the said Peter Anderson has sued out a writ of error from the Supreme Court of the United States, to have said judgment of the Supreme Court of the State of Ohio in said cause mentioned corrected, and has filed a copy thereof in the office of the Clerk of the Supreme Court of Ohio to reverse said judgment, and citation having issued, *directing* — the said obligees in this bond above mentioned, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington, thirty days from this date.

Now the condition of the above obligation is such, that if the said Peter Anderson shall prosecute his writ of error with effect and answer all costs, if he fail to make his plea good then the above obligation is to be void, else to remain in full force and virtue.

In Witness Whereof, the parties have hereunto set their hands, This 17th day of March, 1909.

PETER ANDERSON,
By R. P. CARY, *Attorney.*

["CORPORATE SEAL."]

THE UNITED STATES FIDELITY & GUARANTY CO.,
By PRAFFORD B. TALLMADGE,
Attorney in Fact, Surety.

Approved:—

WILLIAM B. CREW,
Chief and Presiding Judge of the Supreme Court of Ohio.

266 STATE OF OHIO,
City of Columbus, ss:

I, John S. McNutt, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing is a true and correct copy of the original bond filed in said cause.

In witness whereof, I hereunto subscribe my name and affix the Seal of said Supreme Court, in the City of Columbus, Ohio, this 2nd day of April A. D. 1909.

[Seal the Supreme Court of the State of Ohio.]

JOHN S. McNUTT,
Clerk of the Supreme Court of State of Ohio,
By SEBA H. MILLER,
Deputy.

267 In the Supreme Court of Ohio, January Term, A. D. 1907.

THE STATE OF OHIO,
City of Columbus, ss:

Certified Transcript of Docket and Journal Entries.

In the record and proceedings then and there had and held, among other things, is the following, to-wit:

No. 10689.

PETER ANDERSON
vs.
THE UNITED REALTY COMPANY, THE DOW SNELL COMPANY, JOHN P. Freeman, Charles R. Messinger, Rosewell E. Messenger, Aaron Chesbrough, Clarence M. Lamb, Edward H. Thompson, Mary E. Nearing, and The Joseph Schlitz Brewing Co.

Error to the Circuit Court of Lucas County.

C. A. Thatcher, R. P. Cary, C. H. Trimble.
G. A. Bassett, Rhoades & Rhoades, Curtis T. Johnson, —— Fuller, King & Tracy, C. W. Everett, Elmer E. Davis, O. B. Snider.

Date.	Memoranda of pleadings, etc., filed, writs issued, etc.	Judgments, orders, and decrees.
1907.		
May 15.	Petition in Error filed.	
	Circuit Court Transcript filed.	
	Original Papers and Bill of Exceptions filed.	
	Papers sent to R. P. Cary, Tenn. Trust B'ld'g, Memphis, Tenn.	
May 18.	Waiver of Summons of Edward H. Thompson, Clarence M. Lamb, Mary E. Nearing, Joseph Schlitz Brewing Co. and John P. Freeman, filed.	
	Precipe filed.	

Date.	Memoranda of pleadings, etc., filed, writs, issued, etc.	Judgments, orders, and decrees.
268		
1907.		
May 18.	Summons in Error issued for Defendants in Error; The United Realty Co., The Dow Snell Co., Charles R. Messinger, Rosewell E. Messinger, and Aaron Chesbrough, directed to the Sheriff of Lucas County, returnable May 27, 1907.	
May 28.	Summons returned and filed, endorsed: "Received this writ May 20th, 1907, and pursuant to its command on the 22nd day of May, I summoned the within named defendant in error, The Dow Snell Company by delivering to Elmer E. Davis, its attorney of record, a true and certified copy of this writ with endorsements hereon. On the 23rd day of May I also summoned the within named defendant in error Rosewell E. Messinger by delivering to H. E. King of the firm of King & Tracy, his attorneys of record, a true and certified copy of this writ with endorsements hereon. On the 24th day of May I also summoned the within named defendant in error Aaron Chesbrough by leaving at his usual place of residence a true and certified copy of this writ with endorsements hereon. On the 25th day of May I also summoned the within named defendant in error The United Realty Company by delivering to Clayton W. Everett, its attorney of record, a true and certified copy of this writ with endorsements hereon. On the same day I also summoned the within named defendant in error, Charles R. Messinger, by delivering to Clayton W. Everett, his attorney of record, a true and certified copy of this writ with endorsements hereon. On the 27th day of May I also summoned the within named defendant in error Aaron Chesbrough by delivering to Oliver B. Snider, his attorney of rec-	

Date.	Memoranda of pleadings, etc., filed, writs issued, etc.	Judgments, orders and decrees.
	ord, a true and certified copy of this writ with endorsements hereon." Fees $2.70. S. B. CHAMBERS, *Sheriff*, By J. C. NEWTON, *Deputy*.	
July 6.	Papers returned by C. A. Thatcher, Toledo, O. Printed Record filed. Proof of Service filed.	
Nov. 6.	Motion by Plaintiff for leave to file briefs, affidavit and stipulation filed.	
Nov. 12.	Plaintiff's printed Briefs and Proof of Service filed.	
Nov. 12.		Motion by Plaintiff for leave to file Briefs out of rule, allowed. J. 22-53.
269		
1907.		
Nov. 21.	Request for Oral Argument filed.	
Dec. 14.	Defendants' printed Briefs filed.	
Dec. 16.	Proof of Service filed.	
Dec. 20.	Papers sent King & Tracy, Toledo.	
1908.		
Jan. 1.	Papers returned.	
Jan. 7.	Defendant's (John P. Freeman) printed Brief and Proof of Service filed.	
Jan. 23.	Proofs of Service of Defendant's (Freeman) printed Brief filed.	
May 19.	Defendants' supplemental Brief and *and* Proofs of Service filed.	
May 22.	Papers sent Clerk of Courts, Toledo by express. 5/27/'08, returned.	
May 25.	Defendants' additional points and authorities and Proofs of Service filed.	
May 28.	Motion by Plaintiff to pass case out of Oral Argument, assignment etc., and notice filed. 5/28/'08, Affidavits filed.	
May 28.	Plaintiff's Printed Supplemental Brief filed. 5/29/'08, Proof of Service filed.	

Date.	Memoranda of pleadings, etc., filed, writs, issued, etc.	Judgments, orders, and decrees.
June 2.		Motion to pass out of present Assignment overruled. J. 22-349.
June 8.	Plaintiff's Second printed Supplemental Brief filed. 6/9/'08, Proof of Service filed. J. 22-468.	
Nov. 10.		This cause came on to be heard upon the transcript of the record of the Circuit Court of Lucas County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Circuit Court be and the same is hereby *affirmed;* and it appearing to the Court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendants in error recover from the plaintiff in error their costs herein expended to be taxed at $—. Ordered that a special mandate be sent to the Court of Common Pleas of Lucas County, to carry this judgment into execution. Ordered, That a copy of this entry be certified to the Clerk of the Circuit Court of Lucas County, "for entry."
1908.		
Nov. 17.	Mandate Issued.	
Nov. 17.	Original Papers sent Clerk.	
Nov. 27.	Copy of Syllabi and of 2d Sec. of Syllabi filed.	
270		
1909.		
Mar. 17.	Petition for Writ of Error, Writ of Error, Bond for costs on Writ of Error and Citation filed.	
Mar. 17.	Citation taken by R. P. Cary.	
Mar. 17.	Assignment of Errors filed.	
Mar. 29.	Citation returned by C. A. Thatcher.	
Mar. 29.	Acknowledgement of service of Citation by all def'ts-in-error filed.	

I, John S. McNutt, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing transcript of docket and journal entries is truly taken and correctly copied from the Records of said Court, towit—from Minute Book No. 26, Page 397, and that the printed copy of the record hereto attached is a true and correct copy of the printed record filed in said Supreme Court and used in the consideration of said cause.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court, this 2nd day of April, A. D. 1909.

[Seal the Supreme Court of the State of Ohio.]

JOHN S. McNUTT,
Clerk of Supreme Court of Ohio,
By SEBA H. MILLER, *Deputy.*

271 Supreme Court of State of Ohio.

PETER ANDERSON, Plaintiff in Error,
vs.
THE UNITED REALTY COMPANY et al., Defendants in Error.

STATE OF OHIO,
City of Columbus, ss:

I, John S. McNutt, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing Petition for Writ of Error, Writ of Error, Assignment of Error, Citation and Acknowledgment of Service attached thereto, are the original papers filed in this Court in the above entitled cause; that the copy of the Bond hereto attached is a true and correct copy of the original Bond filed in said cause; that the printed copy of the Record attached hereto is a true and correct copy of the Printed Record filed in said Supreme Court and used in the consideration of said cause; that the foregoing transcript of Docket and Journal Entries is truly taken and correctly copied from the records of said Court in said cause; and that the copy of the Opinion of the Court attached hereto is a true and correct copy of the final opinion of said court in said cause.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Supreme Court of Ohio, this 2nd day of April, A. D. 1909.

[Seal the Supreme Court of the State of Ohio.]

JOHN S. McNUTT,
Clerk of the Supreme Court of Ohio,
By SEBA H. MILLER, *Deputy.*

272 In the Supreme Court of the United States.

No. 186, October Term, 1910.

PETER ANDERSON, Plaintiff in Error,
vs.
THE UNITED REALTY COMPANY, ROSEWELL E. MESSINGER et al., Defendants in Error.

Stipulation.

It is hereby stipulated between the plaintiff in error, by his attorney, and the undersigned defendants in error, by their respective

attorneys, that in printing the record in the above entitled cause, the clerk shall print the following papers, documents and stipulations in the order below stated:

1. Petition for writ of error from the supreme court of the United States, p. 253.

2. Said writ of error, p. 256.

3. Bond given with said writ of error, p. 265.

4. Assignment of errors accompanying petition for said writ, p. 259.

5. Petition filed in the common pleas court of Lucas County, Ohio, with date of filing, August 17, 1905.

Record, p. 9 bottom to p. 12 top.

273 6. Answer of The United Realty Company, with date of filing.

Record p. 12 to p. 14.

The clerk shall here print the following stipulation:

7. "It is stipulated that the answers filed by other defendants in said action are all substantially the same as said answer of The United Realty Company."

8. Amended answer of The United Realty Company, with date of filing, February 19, 1906.

Record p. 54 to p. 60, both inclusive.

The clerk shall here print the following stipulation:

9. "It is stipulated that the amended answers filed by other defendants in said action are all substantially the same as said amended answer of The United Realty Company."

10. Reply of Peter Anderson to several answers and amended answers, with date of filing, February 24, 1906.

Record p. 98 bottom to p. 100 near bottom.

11. Reply of Peter Anderson to several amended answers, with date of filing, March 2, 1906.

Record p. 100 bottom to p. 103 upper half.

12. Stipulation, with date of filing, April 25, 1906.

Record p. 109, last half, to p. 127, upper half.

13. Exhibit B of stipulation, being will of Henry Anderson.

Record p. 129 to p. 136.

14. Exhibit C of stipulation, being executors' deed to Charles Butler, and endorsements thereon.

Record p. 136 to p. 140, except bottom of 139.

274 The clerk shall here print the following stipulation:

15. "It is stipulated that Exhibit C is Exhibit No. 4 attached to and made part of plaintiff's bill of exceptions in the common pleas court."

16. Transcript of journal entries in common pleas court.

Record, p. 198, bottom, to p. 201 top.

17. Bill of exceptions in common pleas court.

Record p. 104 to p. 110, except last half p. 109.

The clerk shall here print the following stipulation:

18. "It is stipulated that no oral testimony was offered or received upon the trial of said cause in the court of common pleas."

19. Motion for new trial, with date of filing, March 3, 1906.

Record p. 103, last half to p. 104, top.

20. Petition in error in state circuit court.

Record p. 7, bottom, to p. 9 near bottom.

21. Answer to petition in error in state circuit court.

Record p. 202, last half, 203 and 204, inclusive.

22. Reply to several answers to petition in error in state circuit court.

Record p. 205, last half, p. 206, and closing part of prayer and signatures of counsel at top of p. 207.

23. Motion of defendants in error, filed in state circuit court, October 10, 1906.

Record p. 207, bottom.

24. Bill of exceptions in state circuit court, and Exhibits 1 and 2 thereof.

Record p. 208 to p. 218, upper part.

275 25. Transcript of journal entries in state circuit court.

Record pp. 5, 6 and 7.

26. Petition in error in supreme court of Ohio.

Record pp. 1 and 2 and first half p. 3.

27. Judgment and decree of the supreme court of Ohio, p. 267.

28. Opinion of the supreme court of Ohio, p. 225.

29. The pages referred to are the printed pages of the record in said cause in the supreme court of Ohio, and the other parts of said record shall not be printed.

October 17, 1910.

RHEA P. CARY,
Attorney for Plaintiff in Error.
THE UNITED REALTY CO. AND
ROSEWELL E. MESSINGER,
By HARRY E. KING,
Attorney for said Defendants in Error.
CHARLES R. MESSINGER,
By CLAYTON W. EVERETT,
Attorney for said Defendant in Error.
AARON CHESBROUGH,
By OLIVER B. SNIDER,
Attorney for said Defendant in Error.
JOHN P. FREEMAN,
By EDWARD H. RHOADES, JR.,
Attorney for said Defendant in Error.
CLARENCE M. LAMB AND
EDWARD H. THOMPSON,
By GEO. A. BASSETT,
Attorney for said Defendants in Error.
THE DOW & SNELL COMPANY,
By ELMER E. DAVIS,
Attorney for said Defendant in Error.
MARY E. NEARING,
By RATHBUN FULLER,
Attorney for said Defendant in Error.

276 [Endorsed:] 186/21586. No. 186, October Term, 1910. In the Supreme Court of the United States. Peter Anderson, Plaintiff in Error, vs. The United Realty Company, Rosewell E. Messinger, et al., Defendants in Error. Stipulation.

277 [Endorsed:] File No. 21,586. Supreme Court U. S. October Term, 1910. Term No. 186. Peter Anderson, Pl'ff in Error, vs. The United Realty Company et al. Stipulation as to parts of record to be printed. Filed October 27, 1910.

Endorsed on cover: File No. 21,586. Ohio Supreme Court. Term No. 186. Peter Anderson, plaintiff in error, vs. The United Realty Company, The Dow-Snell Company, John P. Freeman et al. Filed April 5th, 1909. File No. 21,586.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 186.

PETER ANDERSON, PLAINTIFF IN ERROR,

vs.

THE UNITED REALTY COMPANY, ROSEWELL E. MESSINGER, ET AL., DEFENDANTS IN ERROR.

Supplemental Stipulation.

It is hereby stipulated between the plaintiff in error, by his attorney, and the undersigned, defendants in error, by their respective attorneys, that in addition to printing the matter specified in the stipulation heretofore filed herein, dated October 17, 1910, the clerk shall print next after said matter so specified, the following stipulation:

"It is stipulated that the transcript of docket entries in the court of common pleas of Lucas County, Ohio, in case of Peter Anderson, plaintiff, vs. The United Realty Company et al., defendants, shows the following entries:

"1905. August 25.—Petition of The G. H. Hammond Company for removal filed.

"1905. August 25.—Bond of The G. H. Hammond Company for removal filed.

"1905. November 6.—Dismissed as to certain defendants. Petition for removal withdrawn. Journal 137-544."

"It is further stipulated that said entry of November 6, 1905, was duly entered at length upon the journal of said court of common pleas and shows the only action taken by said court in said cause upon or with respect to said removal proceedings, except its action in proceeding further in said cause, pursuant to the agreement of the parties, evidenced by their written stipulation, dated January 2, 1906, which stipulation was duly offered in evidence upon the trial of said action in said court, and is hereinabove printed at length."

"And it is further stipulated that no transcript of the record in said cause has ever been filed in the office of the clerk of the circuit

court of the United States for the northern district of Ohio, western division."

October 31, 1910.

RHEA P. CARY,
Attorney for Plaintiff in Error,
THE UNITED REALTY COMPANY AND
ROSEWELL E. MESSINGER,
By HARRY E. KING,
Attorney for said Defendants in Error.
CHARLES R. MESSINGER,
By CLAYTON W. EVERETT,
Attorney for said Defendant in Error.
AARON CHESBROUGH,
By OLIVER B. SNIDER,
Attorney for said Defendant in Error.
JOHN P. FREEMAN,
By EDWARD H. RHOADES, JR.,
Attorney for said Defendant in Error.
THE DOW & SNELL COMPANY,
By ELMER E. DAVIS,
Attorney for said Defendant in Error.
CLARENCE M. LAMB AND
EDWARD H. THOMPSON,
By GEO. A. BASSETT,
Attorney for said Defendants in Error.
MARY E. NEARING,
By RATHBUN FULLER,
Attorney for said Defendant in Error.

[Endorsed:] 21586. No. 186, October Term, 1910. In the Supreme Court of the United States. Peter Anderson, Plaintiff in Error vs. The United Realty Company, Rosewell E. Messinger et al., Defendants in Error. Supplemental Stipulation.

[Endorsed:] File No. 21,586. Supreme Court U. S., October Term, 1910. Term No. 186. Peter Anderson, Pl'ff in Error, vs. The United Realty Co. et al. Stipulation for addition to record. Filed November 9, 1910.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 27

Office Supreme Court, U. S.
FILED.
NOV 28 1910
JAMES H. McKENNEY,
Clerk.

PETER ANDERSON,
Plaintiff in Error,

vs.

UNITED REALTY COMPANY ET AL.,
Defendant in Error.

Brief and Argument for Plaintiff in Error.

RHEA P. CARY,
Attorney for Plaintiff in Error.

J. G. TAYLOR & CO., PRS. & LITHS., MEMPHIS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910

PETER ANDERSON,
Plaintiff in Error,

vs. No. 186.

UNITED REALTY COMPANY, ET AL.,
Defendants in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This was an action for the recovery of real property, brought in the Common Pleas Court of Lucas county, Ohio, on August 17, 1905. The plaintiff in the case was Peter Anderson, a citizen of the State of Tennessee, and the action was based upon Section 5781 of the Revised Statutes of Ohio. The petition appears on pages 6 and 7 of the printed record, and we quote the same in full as follows:

> "Plaintiff says that he is a citizen and resident of the State of Tennessee. That the United Realty Company, the Dow-Snell Company, and the Heubner Toledo Breweries Company, are corporations organized and existing under the laws of the State of Ohio, having offices and places of doing business in the city of Toledo, Lucas county, Ohio. That

John B. Freeman, Charles R. Messinger, Rosewell E. Messinger, Aaron Chesbrough, Clarence M. Lamb, Edward H. Thompson, Mary E. Nearing, George W. Ruhl, Florence Scott Libbey and Mary A. Scott, are citizens and residents of the county of Lucas, State of Ohio. That Susan M. Johnson is a citizen and resident of the city of Boston, Mass. That the Connecticut Mutual Life Insurance Company is a corporation organized under the laws of the State of Connecticut, having an office and place of doing business in the city of Toledo, Lucas county, Ohio. That the George H. Hammond Company and the Joseph Schlitz Brewing Company are corporations organized under the laws of a state to plaintiff unknown but well known to the defendants (but not the State of Tennessee).

First.

For a first cause of action against the defendants, plaintiff says that he has a legal estate in, is the owner in fee simple of, and is entitled to the immediate possession of the following described real estate, to-wit:

Lots numbered three hundred and thirty-two (332), two hundred and ninety-eight (298), and one hundred and seventy-six (176), in the Port Lawrence division of the city of Toledo, Lucas county, Ohio.

Also, lots numbered nineteen (19), except the southeast nineteen (19) feet of the southwest eighty (80) feet thereof; twenty-one (21), thirty-three (33), thirty-four (34), eighteen (18), and the southeast nineteen (19) feet of the southwest eighty (80) feet of lot numbered nineteen; ten hundred (1,000), ten hundred and one (1,001), and nine hundred and ninety-two (992), all in the Vistula division of the city of Toledo, Lucas

county, Ohio. That said lots exceed one hundred thousand dollars ($100,000.00) in value.

That the said defendants unlawfully keep the plaintiff out of the possession of said premises.

Second.

For a second cause of action against the said defendants, plaintiff adopts and makes a part hereof each and every allegation hereinbefore set forth and says:

That since the 16th day of September, 1902, the plaintiff has had a legal estate in, has been the owner in fee simple of and is entitled to the use and possession of the real estate described in plaintiff's first cause of action.

That the defendants have been wrongfully keeping plaintiff out of the possession of said real estate, and have received the rents, issues and profits therefrom since the said 16th day of September, 1902.

That by reason thereof, the plaintiff has lost said rents, issues and profits and has sustained damages by reason of the unlawful withholding of the possession of said property from the plaintiff during said time, all of which is of the value and damage to the plaintiff in a sum in excess of fifty thousand ($50,000.00) dollars, the exact amount to plaintiff unknown, but well known to the said defendants.

Wherefore, plaintiff prays for judgment against the said defendants for the recovery of the possession of the said premises hereinbefore described, and also for the said sum of fifty thousand ($50,000.00) dollars, with interest thereon; and also for any rents and profits, or damages, which may accrue subsequently to the filing of this action, up to and including the time that judgment may be entered in favor of plaintiff herein.

Plaintiff further prays for costs and all other legal and equitable relief, to which he may be entitled."

On the 25th day of the same month, one of the defendants, the G. H. Hammond Packing Company, filed in that court its petition and bond for removal, which will be found at pages 50 and 51 of the record, and which are referred to in the opinion of the Supreme Court of Ohio, on page 55 of the printed record.

We reprint the petition for removal in full:

"Your petitioner, the G. H. Hammond Company, respectfully shows to this Honorable Court that it is one of the defendants in this suit, which is of a civil nature, and that the amount in dispute between plaintiff and this defendant exceeds the sum or value of two thousand dollars, exclusive of interest and costs.

Your petitioner further shows to the Court that there is in said suit a controversy which is wholly between citizens of different states, and which can be fully determined as between them, to-wit, a separable controversy wholly between your petitioner and the plaintiff relating to the ownership and right to possession of the real estate described as lot 332 in Port Lawrence division, Toledo, Lucas county, Ohio, and the rents and profits of the same.

That your petitioner, the G. H. Hammond Company, was when this suit was begun and still is a corporation duly organized and existing under the laws of Michigan, and was at and prior to the commencement of this action and still is a citizen and resident of the city of Detroit, and the State of Michigan, and not a resident of Ohio. That the plaintiff was, at the time this suit was commenced,

and still is, a citizen and resident of the state of Tennessee.

That the value of the real estate above described which is in controversy between the plaintiff and this defendant exceeded when this suit was begun and still exceeds the sum of $2,000.00, exclusive of interest and costs.

That your petitioner claims to own and is in exclusive possession of the real estate above described, and none of the other defendants is in, or has been since September 15, 1902, in possession of any part thereof, nor have they or any of them received any of the rents, issues or profits thereof. Your petitioner is not and has not been since September 15, 1902, in possession of any of the other parcels of real estate described in the petition and has not received any of the rents, issues or profits thereof.

That your petitioner desires to remove this suit before the trial thereof into the next Circuit Court of the United States to be held in the northern district of Ohio, western division.

And your petitioner offers herewith a bond with good and sufficient surety for its entering in the Circuit Court of the United States for the northern district of Ohio, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said Circuit Court of the United States, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner therefore prays that said surety and bond may be accepted; and that said suit may be removed into the next Circuit Court of the United States to be held in the northern district of Ohio, pursuant to the statutes in such case

made and provided, and that no further proceedings be had herein in this court."

No order of removal was entered by the state court, and on November 6, 1905 (Tr. 39), the plaintiff attempted to dismiss the action as to the said G. H. Hammond Company, and on that day a docket entry appears (Tr. page 40), which reads as follows:

> "This day came the plaintiff in the above entitled action, by his attorney, and dismissed the said action, without prejudice, as to the defendants, the G. H. Hammond Company and the Joseph Schlitz Brewing Company. In consideration thereof said defendant companies withdrew their petitions for the removal of said cause to the United States court. It is therefore ordered and adjudged by the Court that this action be, and the same hereby is, dismissed without prejudice as to said defendants, the G. H. Hammond Company and the Joseph Schlitz Brewing Company, at plaintiff's cost."

Thereafter, by consent of all of the remaining parties, the defense of misjoinder of causes of action, which had been interposed by other defendants, was waived by them, and all of the causes of action were tried together.

The case was tried upon the merits in the Common Pleas Court of Lucas county, Ohio, and resulted in a judgment for the defendants. Upon error proceedings, it was then taken to the Circuit Court of Lucas county, where the judgment of the Common Pleas Court was affirmed. In the Circuit Court, the first error assigned was lack of jurisdiction of the Common Pleas Court

and of the Circuit Court, by reason of the removal proceedings had.

After judgment in the Circuit Court of Lucas county, the case was then taken to the Supreme Court of Ohio on petition in error, where the action of the lower courts, in assuming and retaining jurisdiction of the case, was again assigned as error.

The Supreme Court of Ohio, in an opinion written by Judge Summers (which is to be found at page 53, et seq., of the record), gave quite a concise and correct statement of the case, at least so far as may be necessary to a proper conception of the federal question now involved, and we shall dispense with a more elaborate statement here.

In its opinion, the Supreme Court of Ohio holds that the jurisdiction of the Common Pleas Court of Lucas county, Ohio, was restored by the withdrawal of the petition for removal of the G. H. Hammond Company and the dismissal by the plaintiff of his action against it before any action on the petition and bond had been taken in either the Common Pleas Court of Lucas county, or in the Circuit Court of the United States (Tr. 56). The Supreme Court of of Ohio affirmed the judgments of the Common Pleas Court and the Circuit Court of Lucas county, upon the merits.

On March 17, 1909, the plaintiff in error sued out a writ of error to the Supreme Court of Ohio, and brought the case to this court, where he now urges the following:

ASSIGNMENT OF ERROR.

> "Now comes the plaintiff in error and assigns for error in the above styled cause, the action of the Supreme Court of Ohio in not reversing the judgments of the lower courts therein, and in refusing to hold that said lower courts had no jurisdiction thereof for the reason that the same was and is in the Circuit Court of the United States for the northern district of Ohio, western division."

It appears from the petition setting forth the plaintiff's cause of action that he alleged that he had the fee simple title to, and the right to the possession of, twelve different lots of ground; that seventeen persons and corporations were named as defendants; that the defendants unlawfully kept the plaintiff out of possession of said premises; that the defendants had collected the rents therefrom; and prayed judgment for the recovery of the premises described and for rents collected with interest accrued thereon (Tr. 6-7).

It also appears from the record, by stipulation of the parties subsequently entered into (Tr. 28), that the several defendants possessed and claimed the various portions of land described in the petition in severalty. This stipulation was entered into January 2, 1906.

BRIEF.

There was in this case a separable controversy between the G. H. Hammond Company and the original plaintiff, who is the plaintiff in error herein.

Barney v. Latham, 103 U. S., 205.
Bacon v. Felt, 36 Fed. Rep., 871.
Stanbrough v. Cook, 38 Fed. Rep., 369.
Pacific R. R. Removal Cases, 115 U. S., 2.
Bates v. Carpenter, 98 Fed. Rep., 452.

The fact that neither the plaintiff or defendant was an inhabitant of the northern district of Ohio, did not preclude the Circuit Court of the United States from acquiring jurisdiction upon the filing of the petition and bond for removal in the Common Pleas Court of Lucas county, Ohio.

McCormick Machine Co. v. Walthers, 134 U. S., 41.
St. L. & S. F. Ry. Co. v. McBride, 141 U. S., 127.
Ex Parte Wisner, 203 U. S., 449.
In Re Moore, 209 U. S., 490.

Upon the filing of the petition and bond for removal, the state court was divested of jurisdiction of the suit, and its subsequent orders were coram non judice and void.

R. R. Co. v. Koontz, 104 U. S., 5.
Steamship Company v. Tugman, 106 U. S., 108.
Traction Co. v. Mining Co., 196 U. S., 239.

ARGUMENT.

The only question cognizable by this Court in this case is that of jurisdiction.

The plaintiff in error, who was the plaintiff below, was a resident of the State of Tennessee, in which state none of the defendants resided.

Within the time required, one of the defendants, the G. H. Hammond Company, a citizen of Michigan, filed its petition and bond for removal, which petition and bond each contained the necessary averments and were and are unexceptionable in form.

Thereupon, if the case were a removable one, the jurisdiction of the state court was ipso facto ended and vested in the Circuit Court. All proceedings had in the state court were absolutely void, the state court having, by the mere fact of filing of the petition and bond for removal, lost all jurisdiction, and the whole suit was thereafter pending in the United States Circuit Court.

The third section of the removal act provides that the party desiring to remove—

> "may make and file a petition in said suit in said state court * * * for the removal of such suit into the Circuit Court of the district where such suit is pending, and shall make and file therewith a good and sufficient bond, with sufficient surety. * * * It shall then be the duty of the state court to accept said petition and bond, and proceed no further in said suit."

The proposition above announced is conceded by the Supreme Court of Ohio to be correct. That concession is made by Judge Summers in these words, which we quote from the opinion, appearing at page 55 of the transcript:

> "Upon the filing of such petition and bond, the federal statute makes it the duty of the state court to accept them and to proceed no further in the suit. Thereupon the state court is divested of jurisdiction of the suit, and its subsequent orders are coram non judice, unless its jurisdiction be restored."

In support of this statement, Judge Summers cites Railroad Company v. Koontz, 104 U. S., 5; Steamship Company v. Tugman, 106 U. S., 118; Traction Company v. Mining Company, 196 U. S., 239. Other authorities might be cited, but we apprehend no controversy as to the correctness of the proposition.

The petition and bond being in due form and filed in apt time, and the requisite diversity of citizenship being alleged, it only remains to inquire:

First, Whether on the record, including the original petition of the plaintiff and the petition and bond for removal, a separable controversy appeared; second, whether the case was removable because it appeared that neither plaintiff nor the removing defendant was an inhabitant of the district in which the suit was brought; third, whether the dismissal by the plaintiff as against the removing petitioner in the state court, without any action by the Federal Circuit Court, restored the jurisdiction of the state court.

Of these, in their order:

I.

Does a Separable Controversy Appear?

It is apparent that the allegations of the plaintiff's initial pleading were, that he claimed to own all of the lands in fee; that the defendants were in possession; and that they were each at liberty to assert whatever title they severally had to any or all of the lands. There was no allegation of a joint tort, nor was there allegation of joint action. In fact, under this complaint, the defendants set up several titles to different tracts of land.

Bates v. Carpenter, 98 Fed. Rep., 452, is the reverse of this, being a bill by one in possession to remove a cloud. It was there held that any of the defendants, being at liberty to set up any claim they might have, could remove to the federal court upon the ground that the controversy was separable.

Bacon v. Felt, 48 Fed. Rep., 870, was the same kind of a case, and Judge Shiras reached therein a similar conclusion.

Stainbrough v. Cook, 38 Fed., 369, was an action precisely similar to this. Therein, the same judge held that any one of the defendants could remove upon the ground that the pleadings permitted an allegation of a separable controversy.

In Barney v. Latham, 103 U. S., 205, this Court held that an objection for multifariousness was one to be taken after removal, and that a proper petition by one defendant took with it the whole case. The Court said:

> "The state court ought not to disregard the petition upon the ground that, in its opinion, the plaintiff against whom a removal is sought, had united causes of action which should or might have been asserted in separate suits. These are matters more properly for the determination of the trial court, that is, the federal court, after the case is there docketed."

In the case of Bacon v. Felt, 148 Fed. Rep., 870, the line of cases of the character of Railroad Company v. Ide, 114 U. S., 52, and Pirie v. Tvedt, 115 U. S., 41, are distinguished from such cases as the one at bar, upon the ground that in those cases the defendants had been jointly sued for a tort, whereas a bill to remove a cloud from title or an action in ejectment involved the title to land.

In the case at bar, the proceeding is brought under the statute of Ohio, and therein the title was involved.

That statute is contained in section 5781 of the Revised Statutes of Ohio, which section reads as follows:

> "In an action for the recovery of real property it shall be sufficient for the plaintiff to state in his petition that he has a legal estate therein, and is entitled to the possession thereof, describing the same as required by section 5095, and that the defendant unlawfully keeps him out of the possession; and it shall not be necessary to state how the plaintiff's estate or ownership is derived."

The complaint did not charge that the persons in possession of the land were joint tenants, or jointly interested in any special tract, or that they had jointly trespassed or had jointly committed any tort. The

plaintiff, therefore, did not elect to prosecute his suit against the defendants jointly, and it was open to the defendants to set up their several interests in particular tracts or separate titles to the whole tract.

II.

Was It Material That Neither the Plaintiff Nor the Removing Defendant Was an Inhabitant of the Northern District of Ohio?

We contend that the case was a removable one, notwithstanding the fact that the plaintiff was a resident of the State of Tennessee, and the removing defendant, the G. H. Hammond Company, a corporation under the laws of Michigan.

In the case of Ex Parte Wisner, 203 U. S., 449, it was held that:

> "A suit which, by reason of the non-residence of both parties, could not have been brought in the Federal Circuit Court in the first instance, cannot be removed to that court from a state court, under the acts of March 3, 1887, on the ground of diverse citizenship, at least where the plaintiff resists such removal, even if the consent of both parties could confer jurisdiction."

But this Court later reviewed and modified the holding in Ex Parte Wisner, the review and modification being in the case of In Re Moore, 209 U. S., 490. There it was held that:

> "So long as diverse citizenship exists the circuit courts of the United States have a general jurisdiction. * * * If any objection arises to the

particular court which does not run to the Circuit Courts as a class, that objection may be waived by the party entitled to make it."

After reviewing the authorities at great length, Mr. Justice Brewer said at page 506 as follows:

"As held in Kinney v. Columbia Saving & Loan Association, 191 U. S., 78, a petition and bond for removal are in the nature of process. They constitute the process by which the case is transferred from the state to the federal court, and if, when the defendant is brought into the federal court by the service of original process, he can waive the objection of the particular court in which the suit is brought, clearly the plaintiff, when brought into the federal court by process of removal, may in like manner waive his objection to that court; so long as diverse citizenship exists, the circuit courts of the United States have a general jurisdiction. That jurisdiction may be invoked in an action originally brought in a circuit court, or one subsequently removed from the state court, and if any objection arises to the particular court which does not run to the circuit courts as a class, that objection may be waived by the party entitled to take it."

The learned Justice cited in that opinion the case of McCormick Harvesting Company v. Walthers, 134 U. S., 41, quoting therefrom as follows:

"The jurisdiction common to all circuit courts of the United States, in respect to the subject matter of the suit, and the character of the parties who might sustain suits in those courts, is described in this section (Sec. 1 of the Act of 1888), while the foregoing clause (last clause in the section) re-

lates to the district in which the suit may be originally brought."

He also referred to the case of Gracie v. Palmer, 8 Wheaton, 699, where the court, speaking through Mr. Chief Justice Marshall, held that—

> "the exemption from arrest in the district in which the defendant was not an inhabitant, or in which he was not found at the time of serving of process, was the privilege of the defendant, which he might waive by a voluntary appearance."

Undoubtedly, if the suit had been brought by the plaintiff in error, against the G. H. Hammond Company, in the Circuit Court of the United States for the northern district of Ohio, and service had there been obtained upon the defendant, or if it had been brought against an individual temporarily within the district, and service had been upon him, and a default had been entered against the defendant and judgment rendered thereon, this judgment would have been valid and enforcible, and it would not have availed the defendant that he was not an inhabitant of the district at the time he was served.

If it be true that a petition for removal is the equivalent of process, then upon the filing of that petition in the state court, the plaintiff in error here was called upon to appear in the Circuit Court of the United States mentioned in the petition. From this it follows that the only place where an objection could be taken, upon the ground that neither the plaintiff nor the defendant was an inhabitant of the district, was the Circuit Court of the United States.

III.

Was the Jurisdiction of the State Court Restored?

It is perfectly obvious that, if Steamship Company v. Tugman, supra, is still the law, the jurisdiction of the Federal Circuit Court vested immediately upon the filing of the petition and bond for removal.

We quote at some length from the opinion in that case, as follows:

> "The only remaining question which need be considered is, whether the jurisdiction of the state court was, in any form, restored after the company filed its petition and bond for removal. The defendant in error insists that it was. The petition was accompanied by a bond, which, it is said, conformed to the statute and was ample as to security. Upon the filing, therefore, of the petition and bond —the suit being removable under the statute— the jurisdiction of the state court absolutely ceased, and that of the Circuit Court of the United States *immediately* attached. The duty of the state court was to proceed no further in the case. Every order thereafter made in that court was coram non judice, unless its jurisdiction was actually restored. It could not be restored by the mere failure of the company to file a transcript of the record in the Circuit Court of the United States within the time prescribed by the statute. the jurisdiction of the latter court attached, in advance of the filing of the transcript, from the moment it became the duty of the state court to accept the bond and proceed no further; and whether the Circuit Court of the United States should retain jurisdiction, or dismiss or remand the action, because of the failure to file the neces-

sary transcript, was for it, not the state court, to determine."

If the jurisdiction of the federal court immediately vested upon the filing of the petition and bond for removal, it would seem to be perfectly clear that the state court was impotent to divest the federal court of that jurisdiction. Equally powerless were the parties themselves. Only the Circuit Court itself could divest itself of the exclusive right and power to hear and determine the controversy.

But the Supreme Court of Ohio, after holding that—

> "under the Federal Constitution and laws it was the privilege of one of the defendants to have the suit transferred to a federal court, and when he filed the requisite petition and bond, the jurisdiction of the state court was suspended,"

proceeds to resolve the question against the plaintiff in error on the authority of Garrozi v. Dastas, 204 U. S., 64.

We submit that this holding was based upon a palpable misconception of the Garrozi case. In that litigation, which was begun in the district court of Ponce, one of the defendants, who claimed to be a citizen and subject of France, obtained an order for removal to the United States court. In his petition for removal, he failed to allege his place of residence, and upon this irregularity or omission was based a motion in the federal court to remand. This motion was successfully resisted by the removing defendant, who was permitted to amend his petition in the respect mentioned. The removing defendant was cast in the suit, and thereafter

raised the question, *not that the Porto Rican court was without jurisdiction,* but that the federal court was lacking. The point was not that the court, from which the removal had been effected, had lost its power to hear and determine the cause, but that the court to which the removing defendant had appealed, was lacking in jurisdiction.

In the case at bar it is not contended for the plaintiff in error that the federal court did not acquire jurisdiction as a result of the proceedings in removal, but that, on the contrary, it did so acquire it. Neither is it contended that the state court did not originally possess jurisdiction, but, on the contrary, it is insisted that it did, yet that the very instant the petition and bond for removal were filed, the jurisdiction of the state court ceased and that of the federal court attached. If this conclusion be correct, then it inevitably follows that no amount of consent of parties, however evidenced, can divest the federal court of its acquired jurisdiction, or revest the lost jurisdiction in the state court.

Mr. Justice White, who delivered the opinion of the court in the Garrozi case, expressly placed the decision upon the ground of the unusual and peculiar phraseology of the Act of Congress of 1901, fixing the jurisdiction of the Federal Court of Porto Rico, and concludes the opinion, upon this branch of the case, with the following enunciation:

> "In consequence of the enlarged character of the jurisdiction conferred upon the United States court in Porto Rico by the Act of 1901; that is to say, in consequence of the enlarged character of

the jurisdiction conferred by that act, and the obvious departure which it manifests from the principles controlling the jurisdiction of a United States court as contra-distinguished from a state court, we do not think the rule which demarks the line between the courts of the United States and the state courts within the removal act should be held applicable to Porto Rico to the extent which might have obtained had the Act of 1901 not been enacted. We conclude, therefore, that where a case is removed *from a local Porto Rican court* to the United States court, over which case the latter court would have had jurisdiction as to all the parties impleaded if the case had been there originally brought, even though the removal was irregular, the party who caused the removal cannot be heard, after judgment against him, to assert that the *United States court* was wanting in jurisdiction *solely on the ground that the case was erroneously removed.*"

In the instant case, the jurisdiction of the federal court is unassailed by the plaintiff in error. Nor has there been any suggestion of irregularity or erroneous procedure in the petition or bond for removal.

The plain, simple question is this: Did the mere filing of the unexceptionable petition and bond for removal ipso facto oust the state court of its jurisdiction, and vest the same in the federal court? This vital question is unhampered and unembarrassed by the presence in this record of any informality or insufficiency of the petition or bond for removal.

In Steamship Company v. Tugman, supra, Mr. Justice Harlan said:

> "Nor was the jurisdiction of the state court restored when the company subsequently *consented* to the order requiring the issues to be heard and determined by a referee selected by the parties, or when it appeared and contested the case as well before the referee as in the state courts, up to final judgment."

Upon consideration of the whole case, we submit that there is nothing appearing in the record which can properly be held to validate any of the proceedings had in the state courts after the petition and bond for removal were filed in the Court of Common Pleas of Lucas county, Ohio.

Wherefore, we ask a reversal of the judgments entered, with costs, and proper directions to remand.

RHEA P. CARY,
Attorney for Plaintiff in Error.

Office Supreme Court, U. S.
FILED.
MAR 20 1911
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 247

PETER ANDERSON,

Plaintiff in Error,

vs.

THE UNITED REALTY COMPANY ET AL.,

Defendants in Error.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

HARRY E. KING, ATTORNEY FOR THE UNITED REALTY COMPANY AND ROSEWELL E. MESSINGER.

CLAYTON W. EVERETT, ATTORNEY FOR CHARLES E. MESSINGER.

OLIVER B. SPEER, ATTORNEY FOR AARON CHESEBROUGH.

EDWARD H. ESTABROOK AND EDWARD H. ROLLINS, JR., ATTORNEYS FOR JOHN P. FREEMAN.

ELMER E. DAVIS, ATTORNEY FOR THE DOW & SEELL COMPANY.

GEORGE A. RAMSEY, ATTORNEY FOR CLARENCE M. LANE AND EDWARD H. THOMPSON.

RAYMOND PUTNAM, ATTORNEY FOR HENRY E. NORTON.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 186.

PETER ANDERSON,

Plaintiff in Error,

vs.

THE UNITED REALTY COMPANY ET AL.,

Defendants in Error.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

We feel fully warranted in asserting that no such case as the one at bar has ever been brought to this court for review.

The failure of counsel for plaintiff in error to state in his brief many material facts shown by the record, necessary to a proper understanding of this case, renders it proper, we think, that we should set forth all the essential facts in the order of their occurrence, which in brief are as follows:

PROCEEDINGS IN THE TRIAL COURT.

July 25, 1905, the plaintiff in error, Peter Anderson, a citizen and resident of Tennessee, began a joint action in ejectment in the common pleas court of Lucas county, Ohio, to recover possession and damages for the detention of certain valuable improved real property centrally located in the city of Toledo, Ohio, joining as defendants in said action seventeen parties, some of whom were citizens and residents of Ohio, and others non-residents therein but citizens and residents of other states. (Transcript of Record, pp. 6-7.) One of the latter class of defendants, the G. H. Hammond Company, a Michigan corporation, having filed no motion, demurrer or answer to Anderson's petition, filed a petition for removal of the case to the federal court, alleging as grounds therefor diversity of citizenship and a separable controversy.

Without calling the attention of the state court to this so-called removal proceeding, Anderson forthwith agreed with the Hammond Company and another defendant that if they would withdraw the petition for removal, he would, in consideration thereof, dismiss his action as to them and would submit to a judgment for costs.

In pursuance of this agreement Anderson then went with these defendants before the state court and obtained an order evidencing the agreement and formally dismissing the action, withdrawing the petition for removal and awarding judgment against Anderson for costs.

Said order was duly entered upon the journal of the trial court, November 6, 1905, and is as follows:

"This day came the plaintiff, in the above entitled action by his attorney, and dismissed the said action, without prejudice, as to the defendants, The G. H. Hammond Company and The Joseph Schlitz Brewing Company. In consideration thereof, said defendant companies withdrew their petitions for the removal of said cause to the United States court.

"It is therefore ordered and adjudged by the court that this action be, and the same hereby is, dismissed without prejudice as to said defendants, The G. H. Hammond Company and the Joseph Schlitz Brewing Company, at plaintiff's costs.

"Thereupon plaintiff dismissed said action absolutely and upon the merits as to the defendants, The Connecticut Mutual Life Insurance Company, Mary A. Scott and Florence Scott Libbey, and Susan M. Johnson.

"It is therefore ordered and adjudged by the court that this action be, and the same hereby is dismissed absolutely and upon the merits as to said last named defendants, and that they go hence without day and recover their costs herein." (Tr., 39-40.)

This entry made at the September term, 1905, (Tr., 39-40) shows the only action taken by the common pleas court upon or with respect to said removal proceedings, said court thereafter, at the January Term, 1906, (Tr. 40-41), proceeding to trial and judgment on the merits pursuant to written stipulation between Anderson and the remaining defendants.

No transcript of the record in the state court has ever been filed in the office of the clerk of the federal circuit court at Toledo, Ohio. (See Supplemental Stipulation dated Oct. 31st, 1910, comprising last pages Transcript of Record.)

By the dismissals shown by the above entry Anderson voluntarily dismissed his action "absolutely and upon the merits" as to each and every defendant who was a non-resident of the state of Ohio. (Tr., 6.)

No objection was made or exception taken or entered to the action of the common pleas court, at its September term, 1905, allowing Anderson to dismiss his action as to the removing defendants, the withdrawal of their petitions for removal, and the dismissal of the action as to all of the other non-resident defendants; and Anderson, and all of the parties, allowed the September term, 1905, to close without questioning or challenging these proceedings, and no petition in error to reverse, vacate or modify same was filed within four months from the time said court acted, as provided by the Ohio statute. (Section 6723 now Section 12270 General Code.)

January 2, 1906, without reservation, objection or exception of any kind, Anderson entered into the written stipulation (Tr., 21, 31-32) above mentioned, with nine of the remaining defendants, comprising the defendants in error in whose behalf this brief is filed duly entitled in the court of common pleas, and thereby agreed as to the evidence to be offered in said cause and provided for the submission thereof to said court.

The concluding section of this stipulation is as follows:

> "25th. That the misjoinder of causes of action in plaintiff's petition, if such there be, are hereby waived by the defendants and all the parties to this action do hereby consent and agree to try together all the causes of action set forth in plaintiff's petition.
>
> "That this cause shall be first tried upon the right to recover the real estate described in what is denominated in the petition as the first cause of action, and that the trial of the second cause of action of plaintiff's petition, being the cause of action for the recovery of the rents and profits shall be continued until after the determination of the right to recover the real estate. If plaintiff succeeds in the recovery on the first cause of action, the journal entry shall show that the cause is reserved for further determination as to said second cause of action, but if the plaintiff fails in the recovery of the real estate then the journal entry shall dismiss the petition as to both the first and the second causes

of action, without prejudice to the right of plaintiff to prosecute error from the judgment that may be entered herein.

"The foregoing statement of facts or any part thereof may be used and read in evidence at the trial of this action by either party in lieu of the proofs of the matters herein stated, with the same force and effect that the proof of said facts would have were the same offered and proven in open court in the regular and ordinary way, and subject to any and all objections and exceptions as to competency, relevancy and materiality that might be made against such proof and facts were they offered in the regular way in open court. The said parties are at liberty to offer additional proofs of the foregoing or other facts in this action in support of their respective titles, subject to the same objections and exceptions." (Tr., 21, 31-32.)

The remaining defendants then filed amended answers to Anderson's petition. Anderson filed replies thereto and then procured the assignment and trial of the case, the stipulation above mentioned containing the only evidence offered by any of the parties on said trial. (See Stipulation, Tr., 21.)

This trial, which lasted more than a week, resulted in a directed verdict, in favor of the defendants and against Anderson. March 3, 1906, Anderson filed a motion to set aside this verdict and for a new trial on the usual grounds. (Tr., 17.) March 31, 1906, this motion was overruled and judgment was duly entered on the verdict. (Tr., 41.)

PROCEEDINGS IN THE STATE CIRCUIT COURT.

To reverse the judgment rendered at the January term, 1906, Anderson, on July 14, 1906, filed a petition in error in the state circuit court, and in this petition for the first time raised any question as to the jurisdiction of the trial court. (Tr., 4-5.)

No bond for removal was made part of the record in said proceeding in error, or at any time transmitted to the state circuit court. (Tr., 3-4.)

The nine defendants in error, parties to the above stipulation in the trial court, filed their joint answer to Anderson's petition in error, alleging in substance what had occurred in said case in the trial court. (Tr., 41-42.)

To this answer Anderson filed a reply under oath wherein he denied that the attention of the trial court was not called to the petition for removal, and alleged that by mutual agreement between him and all of the defendants he attempted to dismiss the action so far as same concerned the G. H. Hammond Company and the Joseph Schlitz Brewing Company, and that thereupon the court entered an order of dismissal, but that this was without force and effect because the court was without jurisdiction and that any stipulations made thereafter were for the same reason not binding upon the parties thereto. (Tr., 43.)

To this reply Anderson attached a certified copy of an instrument which he alleged to be a copy of bond for removal filed by the Hammond Company in the lower court but not part of the bill of exceptions or of the record. On motion of the answering defendants in error this instrument was stricken from the reply and from the files. (Tr., 3.)

Anderson then suggested a diminution of the record and moved for an order upon the clerk of the trial court to transmit and file in the circuit court the original or a certified copy of the so-called bond for removal.

This motion was denied, to which ruling Anderson excepted. (Tr., 4.)

After hearing upon Anderson's petition in error and the issues of fact joined by the foregoing answer and reply, on January 25, 1907, the state circuit court rendered a judgment affirming the judgment of the common pleas court and awarding defendants in error a judgment against Anderson for costs. (Tr., 4.) This judgment necessarily included a finding by said court on said issues of fact in favor of the defendants in error.

We respectfully submit that there was neither dispute nor room for dispute between the parties concerning the truth of these facts, but had they been in dispute after their determination by the judgment of the state circuit court they were not open for consideration or review by the state supreme court, and will not be reviewed by this court. (Sec. 6710 R. S. O. now Section 12250 General Code; *Finley vs. Whitley*, 46 O. S., 524.)

PROCEEDINGS IN THE SUPREME COURT OF OHIO.

To reverse the judgment of the state circuit court Anderson prosecuted proceedings in error to the supreme court of Ohio (Tr. 1-2), which court, on November 10, 1908, affirmed said judgment (Tr. 73), holding (Tr. 52) without dissent (Davis, J., dissenting only on other grounds) that:

> "Upon the filing in a state court of the requisite petition and bond for the removal of the suit to a federal court, the state court is divested of jurisdiction; but a party who procures the withdrawal of the petition and bond, by the party who filed it, before any action in the federal court, and then dismisses his action in the state court as to the party who filed the petition for removal, and by agreement with the remaining parties prosecutes the suit in the state court, cannot be heard, after judgment against him, to assert that the jurisdiction of the state court had not been restored."
>
> Anderson vs. The United Realty Company, 79 O. S., 23.

This judgment Anderson asks this court to reverse for want of jurisdiction in the state court. (Tr. 68.)

Of the seventeen parties originally sued by Anderson and joined as defendants in the action in the common pleas court of Lucas county, Ohio, but ten were joined as parties to the proceedings in error in the supreme court of Ohio and in this court (Tr. 66-67), the parties so joined being the defendants in error in whose behalf this brief is filed, and the Joseph Schlitz Brewing Company. The attention of the court is particularly directed to the fact that one of the seven omitted parties is the G. H. Hammond Company, the removing, withdrawing and dismissed defendant.

This company has at no time complained of the judgment rendered by the state court, and manifestly is in no position to do so.

The Joseph Schlitz Brewing Company did not petition for removal, and in the trial court the action was dismissed as to this company, and judgment awarded it against Anderson for costs.

THE CONTENTIONS OF THE PARTIES.

The record establishes, and Anderson in effect admits, the facts to be as we have stated them.

Anderson admits his several agreements, and substantially everything done in pursuance thereof, but says he is not bound by the result because the trial court acted without having jurisdiction. In this we submit he is wrong. Without joining or in any wise regarding the G. H. Hammond Company in the proceedings in error in this court, Anderson asks the reversal of the judgment rendered by the state court at its January term, 1906, to which the G. H. Hammond Company was not a party, and bases his claim for this reversal upon the invalidity of the proceedings had and judgment rendered by the state trial court at its September term, 1905, although same were induced and procured by him, were not objected to or excepted to, and were allowed to become absolute.

Defendants in error contend that the case was not removable; that even if it had been, the separate petition of the G. H. Hammond Company could not and did not effect a removal of Anderson's joint action; that the so-called proceedings in removal were never brought to the attention of or acted upon by the state trial court; that the record does not show that bond was given; that the case was not removed, but that if removed, any rights which might have accrued to any of the parties were, pursuant to agreement with Anderson, withdrawn, abandoned and waived; that the proceedings in the state trial court, at the September term, 1905, permitting the withdrawal of the petition for removal and dismissing the action as to the defendants petitioning for re-

moval, and all other non-resident defendants, were allowed to become absolute, were not reviewed by the state courts and are not open to review by this honorable court, and in no view of the law, without having joined the G. H. Hammond Company as party to the writ of error herein; that if this is not so the jurisdiction of the state court was, by written stipulation, at a subsequent term expressly invoked and restored by Anderson, plaintiff below, and the remaining defendants below; that no transcript of the record has been filed in the federal circuit court; that any possible question of rights based on the attempted removal was waived by all of the parties, and that upon the plainest principles of good faith and fair dealing Anderson is estopped to deny the jurisdiction of the state court or complain of the judgment there rendered.

BRIEF OF THE ARGUMENT.

We respectfully submit that the writ of error herein should be dismissed, and the judgment of the supreme court of Ohio affirmed, for the following reasons:

I.
FOR WANT OF NECESSARY PARTIES.

Plaintiff in error asks the reversal of a judgment in favor of the defendants in error, rendered by the common pleas court of Lucas county, Ohio, at the January term, 1906 (Tr., 40-41, 4, 1), because the proceedings and judgment of said court at the preceding September term, 1905, were invalid, (Tr., 39-40), although this judgment was allowed to become absolute.

It appears that Peter Anderson, the plaintiff below, plaintiff in error here, dismissed his action against the defendants, the G. H. Hammond Company and The Joseph Schlitz Brewing Company, the defendants who petitioned for removal, and a joint judgment of dismissal as to said defendants was thereupon duly entered. (Tr., 40.)

Peter Anderson then also dismissed his action against the defendants, The Connecticut Mutual Life Insurance Company, Mary A. Scott, Florence Scott Libbey and Susan M. Johnson, and a joint judgment of dismissal as to said defendants was rendered accordingly. (Tr., 40.)

The Joseph Schlitz Brewing Company is made party defendant to the writ of error, but none of the other dismissed defendants are made parties thereto. There was no summons and severance, or other equivalent proceeding against any of the omitted parties in this court or in the proceedings in the supreme court of Ohio, and no reason is shown for the nonjoinder of any of these parties.

All parties to the record who appear to have an interest in the decision challenged must be given an opportunity to be heard, and since each of these omitted defendants would manifestly be interested in maintaining the judgment in his favor, rendered by the state court at its September term, 1905, it is clear, we think, that plaintiff in error cannot ask its reversal here without bringing these parties before this court or satisfactorily accounting for not having done so.

Masterson vs. Herndon, 77 U. S., 416.
Terry vs. Abraham, 93 U. S., 38.
Inglehart vs. Stansbury, 151 U. S., 68.
Davis vs. Mercantile Trust Co., 152 U. S., 590.
Wilson vs. Kiesel, 164 U. S., 248.
In re Metropolitan Trust Company, 218 U. S., 312.
Estis vs. Trabue, 128 U. S., 225-230.

And if, on looking into the record, this court finds it has no jurisdiction it will dismiss on its own motion, without awaiting the action of the parties.

Fore River Shipbuilding Co. vs. Hagg, decided Jan. 3rd, 1911, 31 S. C. Rep., p. 185 (Feb. 1st, 1911).
Hilton vs. Dickinson, 108 U. S., 165-168.
Mansfield Ry. Co. vs. Swan, 111 U. S., 379.
Knickerbocker Life Ins. Co. vs. Pendleton, 115 U. S., 339-340.
Ayres vs. Polsdorfer, 105 Fed., 737. (C. C. A., 6th Cir.)
Application for certiorari denied, 187 U. S., 585.

And we respectfully submit that in the case at bar the record discloses a substantial defect in the writ of error which this court cannot amend, and that, therefore, it has no jurisdiction to entertain said suit.

Heirs of Wilson vs. Life & Fire Ins. Co., 12 Peters, 140.
Mason vs. United States, 136 U. S., 581-586.
Dolan vs. Jennings, 139 U. S., 385.
Hardee vs. Wilson, 146 U. S., 179.

II.

AS THIS COURT DOES NOT REVIEW FACTS FOUND BY THE STATE COURT, THE RECORD PRESENTS NO FEDERAL QUESTION FOR CONSIDERATION AND REVIEW HERE.

It appears from the record that the judgment of the state circuit court, affirmed by the supreme court, was rendered after hearing upon pleadings and proof and necessarily included a finding by the circuit court in favor of defendants in error upon the issue as to whether or not Anderson, plaintiff below, and all of the other parties to said action, had abandoned and waived the right, if any such right he or they had, to complain of the jurisdiction exercised by the common pleas court of Lucas county, Ohio. (Tr., 41-49, 4.)

The waiver of such right is not a federal question.

Eustis vs. Bolles, 150 U. S., 361-369.

Pierce vs. Somerset Ry., 171 U. S., 641-648.

"Whether acts or circumstances are sufficient to constitute a waiver of a particular right is a question to be determined by the jury from the evidence of all the surrounding circumstances, declarations and acts of the parties."

Fitch vs. Woodruff, 29 Conn., 82-91.

Farlow vs. Ellis, 15 Gray (Mass.), 229-232.

State Ins. Co. vs. Todd, 83 Pa. St., 272.

Painter vs. Industrial Life Assn., 131 Ind., 68.

Waiver might sometimes be a mixed question of law and fact, but since such questions would be concluded by the verdict of a jury, they were also concluded by the general finding of the state circuit court, and under the Ohio practice were binding upon the supreme court.

Section 6710 of the Revised Statutes of Ohio (now Section 12250, General Code) defining the jurisdiction of the supreme court of Ohio in error, provides that.

> * * * "The supreme court shall not in any civil cause or proceeding, except when its jurisdiction is original, be required to determine as to the weight of the evidence."

In *Finley vs. Whitley*, 46 O. S., 524, the supreme court of Ohio, in construing this section, at pages 527-528 say:

> "The manifest design of such provision, when considered in connection with the establishment of the circuit court, is to enable this court, as far as practicable to limit its province to questions of law, without the necessity of examining all the evidence in a cause. But that object will not be fully attained, if, after a failure to save errors of law that arise during the trial, by bill of exceptions taken in due time, parties may evade the provisions of the statute, by seeking substantial justice through the medium of a motion for a new trial, on the ground that the verdict is not sustained by sufficient evidence, or is contrary to law. Whether the verdict is supported by sufficient evidence, it is clear, we need not inquire. And whether the jury have found contrary to the law, must depend upon the state of the facts; but, to ascertain the facts must involve a determination by this court as to the weight of the evidence, which the statute provides shall not be required."

And the finding of the state circuit court is equally conclusive.

Republican River Bridge Co. vs. Kansas Pac. R. R. Co., 92 U. S., 315-318.

Dower vs. Richards, 151 U. S., 658-668.

Egan vs. Hart, 165 U. S., 188.

Hedrick vs. A. T. & S. F. Ry. Co., 167 U. S., 673-677.

Central National Bank vs. Stevens, 169 U. S., 432.

Minneapolis Railway Co. vs. State, 193 U. S., 53.

Adams vs. Church, 193 U. S., 510.

Clipper Mining Co. vs. Eli Mining & Land Co., 194 U. S., 220.

Gulf Railway Company vs. Texas, 204 U. S., 403-411.

Waters-Pierce Oil Co. vs. Texas, 212 U. S., 86-97.

Kerfoot vs. Farmers & Merchants Bank, 218 U. S., 281.

In *Republican River Bridge Company vs. Kansas Pacific Railroad Company,* 92 U. S., 315, this court, at page 318, say:

> "As it" (this finding) "must from its very nature be a mixed question of law and fact which would be concluded by the verdict of a jury" (or general finding by a court) "it must be equally conclusive here."

And in *Dower vs. Richards,* 151 U. S., 658-668, it was held:

> "It is clearly settled that in an action at law at least this court has no jurisdiction to review the decisions of the highest court of the state upon questions of fact, although a federal question would or would not be presented according to the way in which the question of fact was decided."

And in *Waters-Pierce Oil Co. vs. Texas,* 212 U. S., 86, it is said:

> "This court does not review but accepts as conclusive the findings of facts made by the state court."

III.

NEITHER THE PLAINTIFF NOR THE DEFENDANT WHO PETITIONED FOR REMOVAL WAS A CITIZEN, RESIDENT OR INHABITANT OF OHIO, AND, THEREFORE, THE CASE WAS NOT REMOVABLE.

At the time of the commencement of this action, Peter Anderson, the plaintiff below, was and yet is a citizen and resident of Tennessee (Tr., 6), and the defendant who petitioned for removal, the G. H. Hammond Company, was and is a corporation of the State of Michigan. (Tr., 51.) On March 31, 1906, judgment was rendered against Anderson by the common pleas court of Lucas county, Ohio, at its January term, 1906, (Tr., 41), and until July 14, 1906, nearly four months thereafter, when he filed his petition in error in the state circuit court (Tr., 4-5), he did not question the jurisdiction of the state court, and manifested no willingness to submit his controversy to the federal court; on the contrary, he manifested a distinct unwillingness to do so. This is shown by his inducing the G. H. Hammond Company, *for a consideration,* to withdraw its petition for the removal of said cause, and by his dismissal of the action as to said defendant and as to all of the other non-resident defendants (Tr., 39-40).

Section 1 of the Removal Act of March 1, 1887, as corrected and amended, provides that:

> "Where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or defendant."

Section 2 of the same act provides for the removal to the circuit court of the United States of actions commenced in a state court in which the circuit court was given original jurisdiction by the preceding section. This court has repeatedly held that no suit is removable under Section 2, unless it could have been brought originally in the circuit court of the United States.

Tennessee vs. Bank, 152 U. S., 454.
Mexican Nat'l R. R. vs. Davidson, 157 U. S., 201.
Cochran vs. Montgomery County, 199 U. S., 260.
Exparte Wisner, 203 U. S., 449.

The requirement of the statute with respect to suit being brought in the district of the residence of either plaintiff or defendant, is jurisdictional, personal in its nature, and may be waived by the parties, but it is settled that unless such question shall be waived by both parties the court can have no jurisdiction in cases brought in a district in which neither of the parties reside.

Exparte Wisner, 203 U. S., 449.
In re Moore, 209 U. S., 490.
Western Loan Co. vs. Mining Co., 210 U. S., 368.
Kreigh vs. Westinghouse & Co., 214 U. S., 249.
Macon Grocery Co. vs. Atlantic Ry. Co., 215 U. S., 501.
Foulk vs. Gray, 120 Fed., 156.
Mahopulis vs. Chicago Railway Co., 167 Fed., 165.
Moyer vs. Chicago Railway Co., 168 Fed., 105.

The consent of both parties is a prerequisite to complete jurisdiction upon the removal of such a case.

Clark vs. Southern Pacific Co., 175 Fed., 122-127.

It is equally well settled that the state court is not required, or even authorized, to surrender its jurisdiction, unless the petition for removal, in connection with the other matters on the record at that time shows the jurisdictional facts upon which the right of removal depends and affirmatively shows a right in the petitioner to demand the removal and to have his case tried in the tribunal to which he asks to have it removed.

Stone vs. South Carolina, 117 U. S. 430-432.
Burlington Ry Co. vs. Dunn, 122 U. S. 513.
Powers vs. C. & O. Ry. Co., 169 U. S., 92-101.

Applying the rules and authorities found in these statutes and decisions to the case at bar, we respectfully submit:

That the circuit court of the United States for the northern district of Ohio did not have jurisdiction to hear this case except by consent of the plaintiff and the defendants:

That the record in the state court at or after the time the petition for removal was filed does not disclose any desire, consent or willingness on the part of the plaintiff to have his controversy submitted to the federal court; and, therefore,

That the record in the state court at the time the petition for removal was filed does not show a right in the petitioner to have his controversy determined in the circuit court of the United States for the northern district of Ohio; nor does it show jurisdiction in that court to proceed and hear said controversy if it were removed thereto.

IV.

THE SEPARATE PETITION FOR REMOVAL OF THE DEFENDANT, THE G. H. HAMMOND COMPANY, DID NOT AND COULD NOT EFFECT A REMOVAL OF THIS CASE, WHEREIN THE DEFENDANTS WERE SUED JOINTLY.

Each and every allegation in each of the two causes of action set forth in Anderson's petition is made jointly against all of the defendants. (Tr., 6-7.)

No motion, demurrer or answer to this petition was filed by the defendant, the G. H. Hammond Company. On August 25, 1905, this defendant filed its separate petition for removal to the federal circuit court, alleging as grounds therefor diversity of citizenship and a separable controversy. (Tr., 51.)

We respectfully submit that, since Anderson in his petition in this case charged all of the defendants as joint trespassers, it could not be removed into the federal court upon the separate petition of the defendant, the G. H. Hammond Company, a non-resident of Ohio, although this defendant alleged in its petition for removal that it was not jointly interested or liable with the other defendants, and that its controversy with the plaintiff was a separate one.

In other words, the defendant, the G. H. Hammond Company, could not, by merely making contrary averments in its petition for removal and setting up a case inconsistent with the allegations of Anderson's petition, segregate itself from the other defendants, and thus entitle it to remove the case into the United States court.

Little vs. Giles, 118 U. S. 596-600.

The question whether there is a separable controversy warranting a removal to the circuit court of the United States must be determined by the state of the pleadings and the record of the case at the time of the application for re-

moval, and not by the allegations of the petition therefor, or the subsequent proceedings which may be had in the circuit court.

Corbin vs Van Brunt, 105 U. S. 576-7-8.
Farmington vs. Pillsbury, 114 U. S. 138.
Pirie vs. Tvedt, 115 U. S. 41.
Crump vs. Thurber, 115 U. S. 56.
Starin vs. New York, 115 U. S. 248.
Fletcher vs. Hamlet, 116 U. S. 408.
Sloan vs. Anderson, 117. U. S. 275-278.
Insurance Co. vs. Huntington, 117 U. S. 280.
Core vs. Vinal, 117 U. S. 347.
Mining Co. vs. Canal Co. 118 U. S. 264.
Railroad vs. Grayson, 119 U. S. 240.
Graves vs. Corbin, 132 U. S. 571-585.
Railway Co. vs. Wangelin, 132 U. S. 599.
Torrence vs. Shedd, 144 U. S. 527.
Wilson vs. Oswego Twp. 151 U. S. 56.
Powers vs. Railway Company, 169 U. S. 92.

In *Louisville & Nashville Railroad Company vs. Ide,* 114 U. S. 52, several defendants were sued jointly and as joint contractors. One of them contended that since, under the practice in that state, judgment might be given "for or against one or more plaintiffs and for or against one or more defendants," so that, where several were sued on a joint contract, and it appeared that only a portion of them were bound, the plaintiff might recover against those who were actually bound, the controversy between the plaintiff and each joint contractor was separable. The court held, however, that the statute did not have this effect,—that it "did not make a joint contract several, nor divide a joint suit into separate parts." "It may expedite judicial proceedings," it was said, "and save costs, but it does not change the form of the controversy;

that is to say, the case. The plaintiff can still sue to recover from all, though he may be able to succeed only as to a part."

At page 56 the court say:

> "The claim of right to a removal is based entirely on the fact that the Louisville and Nashville Company, the petitioning defendant, has presented a separate defense to the joint action by filing a separate answer tendering separate issues for trial. This, it has been frequently decided, is not enough to introduce a separate controversy into the suit within the meaning of the statute. * * Separate answers by the several defendants sued on joint causes of action may present different questions for determination, but they do not necessarily divide the suit into separate controversies. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. Smith vs. Rines, 2 Sumner, 348. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject matter of the controversy, and that is for all the purposes of the suit whatever the plaintiff declares it to be in his pleadings."

The case of *Alabama Southern Railway vs. Thompson*, 200 U. S. 206-16-20, is directly in point.

In the course of the opinion therein, at page 216, the court say:

> "It is recognized that the plaintiff may select his own manner of bringing his action and must stand or fall by his election. If he has improperly joined causes of action he may fail in his suit; the question may be raised by answer and the right of the defendant adjudicated. But the question of removability depends upon the state of the pleadings and the record at the time of the application for removal, Wilson vs. Oswego Township, 151 U. S. 56, 66, and it has been too frequently decided to be now questioned that the plaintiff may elect his own method of attack, and the case which he makes in his declaration, bill or complaint, that being the only pleading in the case, is to determine

the separable character of the controversy for the purpose of deciding the right of removal. Louisville & Nashville Railroad Co. vs. Ide, 114 U. S. 52; Graves vs. Corbin, 132 U. S. 571; Little vs. Giles, 118 U. S. 596; East Tennessee V. & G. R. R. vs. Grayson, 119 U. S. 240; Torrence vs. Shedd, 144 U. S. 527; Chesapeake & Ohio R. R. vs. Dixon, 179 U. S. 131; Southern Ry. vs. Carson, 194 U. S., 136."

After citing and quoting *Whitcomb vs. Smithson*, 175 U. S. 635, the court further say:

"In other words, the right to remove depended upon the case made in the complaint against both defendants jointly, and that right in the absence of a showing of fraudulent joinder, did not arise from the failure of the complainant to establish a joint cause of action.

"The fact that by answer the defendant may show that the liability is several cannot change the character of the case made by the plaintiff in his pleading so as to affect the right of removal" * * * * * * *

After stating that there is nothing in the case under consideration (and certainly there is nothing in the case at bar) suggesting an attempt to commit a fraud upon the jurisdiction of the federal court, it is further said in the opinion:

"Upon the face of the complaint, the only pleading filed in the case, the action is joint. It may be that the state court will hold it not to be so. It may be, which we are not called upon to decide now, that this court would so determine if the matter shall be presented in a case of which it has jurisdiction. But this does not change the character of the action which the plaintiff has seen fit to bring, nor change an alleged joint cause of action into a separable controversy for the purpose of removal. The case cannot be removed unless it is one which presents a separable controversy wholly between citizens of different states. In determining this question the law looks to the case made in the pleadings, and determines whether the state court shall be required to surrender its jurisdiction to the federal court.

"As early as 1816 this court, in determining a question of jurisdiction, was governed by the character of the suit brought by the plaintiff. In New Orleans vs. Winter, 1 Wheat. 91, it was held that a citizen of a territory could not sue in a federal court by joining with himself a citizen of another state. The opinion was delivered by Chief Justice Marshall, who said (p. 95): 'in this case it has been doubted whether the parties might elect to sue jointly or severally. However this may be, having elected to sue jointly, the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite.'"

The court concludes:

"The applicant for removal has been duly summoned into a cause in course of prosecution in the state court. All the defendants not being non-residents it can remove only if it presents a separable controversy, which can be wholly determined between itself and the plaintiff. The test of such controversy, as this court has frequently said, is the cause of action stated in the complaint. That is joint in character, and there is no attack upon the good faith of the action. In such case we hold that no separable controversy is presented within the meaning of the act of Congress."

Cited and followed in Southern Ry. Co. vs. Miller, 217 U. S. 209.

"Whether two defendants are improperly joined, and whether there is a separable controversy authorizing a removal of the cause by one of the defendants to the federal court, must be determined by the case made by the complaint, and the question of removal cannot be made to depend upon the question whether the federal court might eventually determine that the theory on which the action was brought was erroneous, and that no joint liability in fact existed."

Galeotti vs. Diamond Match Company, 178 Fed. 127.

The foregoing decisions do not permit counsel for plaintiff in error to claim any benefit from stipulation of January 2, 1906, (Tr., 21-32) as it was not part of the record August 25th, 1905, when the G. H. Hammond Company filed its petition for removal.

Counsel for plaintiff in error cites and relies upon *Stanbrough vs. Cook,* 38 Fed. 369, (C. C. Iowa, 1889); *Bacon vs. Felt,* 38 Fed., 870, (C. C. Iowa, 1889); and *Bates vs. Carpentier,* 98 Fed. 452 (C. C. Calif. 1899), but we respectfully submit that they do not apply to the case at bar and are clearly distinguishable from it.

An examination of these cases discloses that in the several bills filed therein it was in each instance alleged in substance that the defendants had or claimed some interest in certain property which they were asked to assert or be thereafter barred from so doing, and none of these cases involved a controversy based upon a single title or a single source of title as in the case at bar.

Thus in *Stanbrough vs. Cook, supra,* the court, at page 373, say:

> "The petition does not aver that all the defendants claim title to the realty jointly, or under one common source of title; nor does it aver that they jointly converted to their own use the crops growing on the land, or that they jointly injured the buildings for which the damages are prayed. * * * The decisions therefore, defining the rule applicable to suits based upon joint or joint and several causes of action, do not touch a case of the peculiar character now before the court, for the reason that the petition in this cause does not seek to declare against all the defendants jointly."

And in *Bacon vs. Felt, supra,* the court, at page 872,, say:

> "The bill, therefore, does not present a single controversy * * * but on the contrary it requires each defendant to set up any claim or right he may have or be forever barred from so doing."

And in *Bates vs. Carpentier,* supra, the court, at page 454, say:

> "But the plaintiff does not aver that all the defendants claim title to the realty jointly, or under one common source of title."

Certainly no such claim as this could be made with respect to the petition in the case under consideration.

Counsel for plaintiff in error also cites and relies upon *Barney vs Latham,* 103 U. S. 205.

From the opinion in this case, page 213-214, it appears that the complaint alleged several distinct controversies, one of which was held to be an entirely separate controversy between the plaintiffs and the individual defendants who petitioned for removal, and that with such a controversy the defendant Land Company, which did not join in the petition for removal, had no necessary connection, and that this controversy could be fully determined as between the parties actually interested in it without the presence of the Land Company as a party in the cause.

The court, at page 214, say:

> "Had the suit sought no other relief than such a decree, it could not be pretended that the corporation would have been a necessary or indispensable party to that issue. Such controversy does not cease to be one wholly between the plaintiffs and those defendants because the former for their own convenience chose to embody in their complaint a distinct controversy between themselves and the Land Company."

Because of this separate controversy it was held that the cause was removable.

Pacific Railroad Removal Cases, 115 U. S. 2, is a case somewhat similiar to *Barney vs. Latham, supra.*

It was therein held (opinion p. 22) that the several suits sought to be removed involved two distinct issues or grounds of controversy, and perhaps a third, and that this controversy involving these three issues was a distinct and separable controversy.

Certainly none of the above cases can be said to be like the case at bar, wherein the plaintiff in error, in his petition below for first cause of action against all of the defendants says: (Tr. 6-7.), "That he has a legal estate in, is the owner in fee simple of, and is entitled to the immediate possession of" (certain real estate specifically described) "and that the said defendants unlawfully keep the plaintiff out of the possession of said premises."

And for second cause of action against all of the defendants, adopts and makes part each and every allegation in his first cause of action, and further alleges that the defendants have been wrongfully keeping plaintiff out of the possession of said real estate, and have received the rents, issues and profits thereof from September 16, 1902, and that by reason thereof plaintiff has sustained damages in excess of $50,000.

The petition concludes with a prayer for judgment against all of the defendants for the recovery of the possession of the property, and also for the sum of $50,000, with interest, and any further damages which may accrue.

We respectfully submit that each and all of the allegations in the several causes of action in this petition are, as to all of the defendants, joint and joint only, and that the petition presents no severable or separable controversy, and that the claim of counsel for plaintiff in error that the petition alleges a separable controversy is untenable.

The provisions of Section 5781 of the Revised Statutes of Ohio, now Section 11903, General Code, quoted by counsel for plaintiff in error in his brief, at page 13, merely provide what the plaintiff in an action in ejectment shall allege in his petition. It does not undertake in any wise to control or affect the undoubted right of the plaintiff in such an action to bring his suit jointly or severally. Indeed, there is nothing peculiar or unusual in the practice in Ohio in this regard.

One cannot read the petition (Tr. 6-7) without being impressed with the fact that each and every allegation in each of the causes of action therein are joint and never several, and that the pleading manifests a studied purpose on the part of counsel for plaintiff in error to clearly allege only joint causes of action against all of the defendants, and thus render it out of the power of the defendants to remove the case to the federal court unless all should join in the petition therefor. Having elected to sue the defendants jointly, plaintiff in error, for the purpose of removal at least, is bound by and must accept the result of his election.

We further respectfully submit that it does not appear from the record in the case at bar that any bond for removal was filed, and that for this reason the court of common pleas was not required to consider or regard the alleged petition for removal.

The mere fact that a paper was found among the files in this cause does not of itself make it a part of the record. If not a part of the pleading or process in the cause, it must be put into the record by some action of the court.

England vs. Gebhardt, 112 U. S. 502-505.

"This right of removal is statutory. Before a party can avail himself of it, he must show upon the record that his is a case which comes within the provisions of statute. * * If he fails in this, he has not, in law, shown to the court that it cannot 'proceed further with the cause.' Having once acquired jurisdiction, the court may proceed until it is judicially informed that its power over the cause has been suspended."

Insurance Company vs. Pechner, 95 U. S., 183-185.
Stone vs. South Carolina, 117 U. S. 430.

The record in the state court including the petition for removal of the defendant, the G. H. Hammond Company, did not show that the petitioner had a right to have the case transferred to the federal court, and raised no issue of fact, but simply a question of law with respect to the right of removal. "That question the state court had the right to decide for itself." This was a judicial act, and although subject to review, upon proper proceedings seasonably prosecuted by the G. H. Hammond Company, the defendant who petitioned for removal, was not a nullity. Had the G. H. Hammond Company not withdrawn its petition for removal but had taken proper steps to maintain its alleged right, had remained in the case, and the further proceedings in the state court had been had without regard to its rights and over its objection, questions would be presented not now before the court. Upon the facts shown by the record, the state court was not bound to surrender its jurisdiction.

Stone vs. South Carolina, 117 U. S. 430.
Burlington Ry. Co. vs. Dunn, 122 U. S. 513.
Traction Co. vs. Mining Co. 196 U. S. 239-240.
In re Metropolitan Trust Company, 218 U. S., 312.

The undoubted right and power of the federal court to protect the right of removal when duly asserted by a party entitled thereto is not disputed or open to dispute or discussion. How can this case present such a question with no removing defendant before the court?

Counsel for plaintiff in error seems to regard his client as being in some way entitled to assert and claim any rights which the G. H. Hammond Company might have asserted herein, but assigns no reason why this should be so. Clearly, Anderson, as plaintiff below, had no right to remove this cause.

By the express terms of the removal act, the right to remove a suit on the ground that there is a separable controversy is confined to the defendant, or defendants actually interested in such controversy, and no other defendant (and clearly not the plaintiff) can make the application for removal.

Rand vs. Walker, 117 U. S. 340.

We respectfully submit that the reversal of the judgment below would require this court to consider questions not raised in the state trial court; that plaintiff in error, did not save his rights as to any of these questions, in any way known to the law, and well established rules of practice forbid such reversal.

Green County vs. Thomas, 211 U. S. 598-602.
Sully vs. American Nat. Bk., 178 U. S.. 289.

V.

IF ANY RIGHT OF REMOVAL EVER EXISTED IN THIS CASE IT WAS ABANDONED AND WAIVED AND THE JURISDICTION OF THE STATE COURT RESTORED.

The right to remove a cause from the state to the federal court is the personal right of the defendant who duly files proper removal proceedings in the state court. This right may be waived, not only by stipulation or agreement, but by non-exercise of the right or by conduct which is equivalent to a waiver.

Insurance Co. vs. Morse, 87 U. S., 445-450.

Hanover Nat. Bank vs. Smith, Fed. Cases, 6035.

McLean vs. St. Paul Ry. Co., Fed. Cases, 8893. (Affirmed 108 U. S., 212.)

Barron vs. Burnside, 121 U. S., 186-198.

Pierce vs. Somerset Ry. Co., 171 U. S., 641.

Anderson vs. The United Realty Co., et al., 79 O. S., 23.

Pollock vs. Cohen, 32 O. S., 514.

St. L. W. & W. R. Co. vs. Ransom, 29 Kansas, 298. (Opinion by the late Mr. Justice Brewer.)

Amy vs. Manning, 144 Mass., 153. (Aff'd Manning vs. Amy, 140 U. S., 137.)

Smithson vs. C. G. W. Ry. Co., 71 Minn., 216, 224-226. (Aff'd Whitcomb vs. Smithson, 175 U. S., 635.)

Home Insurance Co. vs. Curtis, 32 Mich., 402. (JJ. Graves, Cooley, Campbell and Marston.)

First National Bank vs. Conway, 67 Wis., 210-218.

Wadleigh vs. Standard Life & Acc. Ins. Co., 76 Wis., 439.

Hazard vs. Durant, et al., 9 R. I., 602-606-607.
Dart vs. Arnis, 19 How. Prac., 429.
Gaffney vs. Gillette, Fed. Cases, 5168. (4 Dill, 264. Opinion Hon. J. F. Dillon, C. J.)
Hudson River Company vs. Day, 54 Fed., 545. (C. C. N. J., 1893.)
State of West Virginia vs. King, 112 Fed., 369. (C. C. W. Va., 1901.)

In *Insurance Company vs. Morse,* 87 U. S., 445, it is held, at page 450, that a general waiver in advance of the right of removal is void, but that in a civil case a party may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So, he may omit to exercise his right to remove his suit to a federal tribunal, as often as he thinks fit, in each recurring case. In these aspects, any citizen may, no doubt, waive the rights to which he may be entitled.

In *Hanover National Bank vs. Smith,* 13 Blatchf., 224, the court, at page 225, say:

> "Two questions are thus presented—first, whether the right of removal in a particular case can be waived; and, second, whether such a waiver should, in this case, be imputed to the defendant.
>
> Upon the first of these questions we are not without an intimation of the opinion of the Supreme Court, in Insurance Company vs. Morse. * * * *
>
> Any citizen may, no doubt, waive such right. * * In the waiver of the right to resort to the courts of the United States, in a particular case, only the private right of the individual is concerned. Its waiver touches no question of public policy. Its effectiveness stands upon the maxim, that any man may renounce a legal right which is conferred for his own advantage. The right in question may, therefore, be waived by any sufficient agreement of the party, as well by the direct consent, as by that implied by the non-exercise of the right in the manner prescribed by law. A stipulation after suit commenced in the state court would, I think, be, on the principles mentioned, a complete

> bar to the exercise of the right of removal, and, on the same ground, any conduct of the party which is equivalent to such a waiver, ought to be enforced as such by the court."

The doctrine of the Morse case is again declared in *Barron vs. Burnside,* 121 U. S., 186-198.

And in *Pierce vs. Somerset Railway Company,* 171 U. S., 641, the court, at page 648, say:

> "A person may by his acts or omission to act waive a right which he might otherwise have under the constitution of the United States, as well as under a statute, and the question whether he has or has not lost such right by his failure to act, or by his action, is not a federal one."

A party entitled to remove must not experiment on his case in the state court and on an adverse decision then transfer to the federal court.

In *Jifkins vs. Sweetzer,* 102 U. S., 177, in referring to removal proceedings under the act of 1867, on the ground of local influence and prejudice, the court, at page 179, say:

> "These statutes do not, any more than that of 1875, 'Allow a party to experiment on his case in the state court and, if he meets with unexpected difficulties, stop the proceedings and take his suit to another tribunal.' He must make his election before he goes to trial or hearing on the merits."

And in *Rosenthal vs. Coates,* 148 U. S., 142, the court, at page 147, say:

> "Further, to sustain this removal would certainly violate the spirit of the removal acts, which do not contemplate that a party may experiment on his case in the state court, and, upon an adverse decision, then transfer it to the federal court. Here, Rosenthal has gone through the state trial and appellate courts, and his rights have been finally declared by the supreme court of the state; and though as yet no formal decree has been entered in the trial court, it is none the less true that he has experimented with the state courts and been beaten, and now seeks a different forum." Citing Jifkins vs. Sweetzer, *supra.*

We regard the case of *The St. Louis, Wichita & Western Railroad Company vs. James Ransom,* 29 Kansas, 298, as furnishing a complete answer to the claim of want of jurisdiction in the state court asserted by counsel for plaintiff in error in the case at bar.

The opinion therein is by the late Mr. Justice Brewer.

The Railroad Company commenced this action in one of the district courts of Kansas against two defendants, charging them with having jointly committed a trespass upon the real estate of the plaintiff. The plaintiff and one defendant were citizens of Kansas, the other defendant was a citizen of Missouri. Both defendants appeared by the same attorney, but each filed a separate answer. The defendant citizen of Missouri filed its petition and bond for the removal of the case to the United States circuit court, alleging in the petition as grounds for removal diversity of citizenship and a separable controversy. This petition was granted and removal ordered. On the following day the case was called for trial between the plaintiff and the other defendant. No objection was made to the jurisdiction of the court, and application for continuance having been overruled, a jury was waived and the case was, by consent, submitted to the court for trial. The court found for the plaintiff and rendered judgment in his favor.

A motion for a new trial was duly made and overruled, and the defendant prosecuted error to the supreme court of Kansas. The principal error relied upon, as in the case at bar, was that after the filing by the other defendant in the action, The St. Louis & San Francisco Railroad Company, of the petition and bond for removal, the entire case was removed to the United States circuit court and the jurisdiction of the state court instantly and absolutely ceased, and that, therefore, all subsequent proceedings in the state court were null and void.

In support of this proposition, the plaintiff in error relied upon *Barney vs. Latham,* 103 U. S., 205, and *Kern vs. Huidekoper,* 103 U. S., 485.

In the course of the opinion, at page 300, the court say

"It is conceded, and we shall assume (on the authority of the above cases), that by the petition and bond of the St. Louis & San Francisco Railroad Company the entire case, both as to it and the present plaintiff in error, was removed to the United States circuit court, and that while the present plaintiff in error could not of itself remove the case, yet it might avail itself of the action of its co-defendant and insist upon going with it to the United States court. All this is conceded. Perhaps a distinction might be drawn between this case and the cases cited from 103 U. S., but we do not care to pursue the inquiry. We shall assume that those cases are controlling, and still we think that the ruling of the district court must be sustained. Those cases decide substantially that one of two defendants may remove the entire case to the federal court, and this notwithstanding the existence of a separable controversy between the plaintiff and the other defendant, of which the federal courts have no jurisdiction. Concede all this, and yet this does not decide that one defendant having the right to a removal can prevent the other defendant, having no right to a removal, from submitting its controversy with the plaintiff to the determination of the state court in which it was sued. Though the present plaintiff in error could have availed itself of the benefits given by the petition of its co-defendant, and gone with it to the federal court, yet it was not bound to avail itself of that privilege. It could elect to submit its controversy with the plaintiff to the determination of the courts of the state in which it was acting, and by the authority of whose laws it was created and received power to act (and we may add that common decency required it to abide by the decision of the courts of such state), and such election could not be defeated by any act of its co-defendant. This is not like the case of The National Steamship Company vs. Tugman, recently decided by the Supreme Court of the United States, and reported in 15 Cent. Law Jour., p. 448, in which, after a refusal by the state court to grant an application for a removal, the defendant proceeded in the state court, and elected between several modes of procedure authorized by the state practice, and in which the Supreme Court of the United States held that such election did not waive any rights granted

by its petition for a removal; for here the present defendant had of itself no right of removal; never sought to avail itself of any privileges given by the action of its co-defendant; but voluntarily elected to submit its controversy with the plaintiff to the decision of the state court. It may be remarked here, that the first time any question was made as to the jurisdiction of the state court, was by the petition in error filed in this court. Prior to the trial in the district court, it made no question as to its jurisdiction; it suggested no want of jurisdiction on a motion for a new trial; apparently it elected to litigate its controversy with the plaintiff in the state court, in the court in which it was sued. And only after having been finally defeated in the trial court, did it first suggest, and by petition in error in this court, that the trial court had lost jurisdiction by the application of its co-defendant for removal. We think in this, its action is too late. While its co-defendant had the right to remove the entire case, and while it had the right to insist upon going with such defendant to the federal court, yet such right was one which it could waive, one whose waiver was not prejudicial to the rights of its co-defendant; and having waived such right until after trial and judgment, it cannot now insist upon it. Without any process served upon it, and independent of any action against its co-defendant, it could come into the state court and submit to it the determination of any controversy between it and the plaintiff. This in effect it did; and having done so, it cannot now say that it might have gone with its co-defendant to another tribunal for the determination of such controversy. As a rule, this court reviews only errors committed by the trial court, and that court only errs when it grants or refuses direct application made by one or other of the parties. If no application for any ruling is made to that court, and no ruling is in fact made, this court cannot affirm error in the proceedings of the trial court. This, as a general proposition, is un-

> questioned, and there is nothing to take the present case out of the general rule. This is the principal question in the case, and in it we see nothing to justify any interference with the judgment of the district court. * * * * * * *
>
> There being no other questions in the case, the judgment of the district court will be affirmed."
>
> All the Justices concurring.

We respectfully submit that the following authorities support the contention of defendants in error that the right to object to the jurisdiction of the state court was abandoned and waived.

Smithson vs. Chicago Great Western Railway Company, 71 Minn., 216 (affirmed on other grounds in *Whitcomb vs. Smithson,* 175 U. S., 635), it appeared that after proceedings in removal had been instituted and the case remanded to the state court, the removing defendant being in default for answer, stipulated, in writing, with the plaintiff's attorneys, that in consideration of being relieved from this default, and of being allowed to answer, the issues should be tried in the state court, and an answer was filed accordingly. Thereafter, the removing defendant attempted to interpose an amended answer alleging a want of jurisdiction on the part of the state court on the ground that the case had theretofore been duly removed to and was then pending in the circuit court of the United States and not elsewhere. The state court refused to permit this amendment to be filed.

The supreme court of Minnesota, upon proceedings in error, sustained the action of the lower court, and in the course of its opinion, at page 225, say:

> "The receivers, in consideration of being permitted to answer the complaint after having been in default for several months, expressly agreed to try the case in the state court. Through this agreement they secured a substantial right—the right to answer. If prior to that time there had been a real controversy over the receivers' right to have the cause tried in the federal court, it was then and there settled by a formal stipulation, deliberately entered into by counsel, which they

must abide by, and which will be enforced by the courts in the interest of fair dealing and professional good morals. It seems hardly necessary to conclude on this feature of the case by saying that a defendant who is entitled to have his case removed from a state to a federal court, or from the latter to the former, there being no question of jurisdiction over the subject matter, or over the parties, may waive his rights to insist upon a removal by his acts or omissions."

In *Home Insurance Company vs. Curtis,* 32 Michigan, 402, it was held:

"Where parties have filed a bond and petition for the removal of the cause to the United States court, but proceed, without calling the attention of the court to this fact, to a trial of the cause upon the merits, without questioning the jurisdiction in any way, they thereby waive all rights they may have had to insist that the cause was by such bond and petition transferred; parties may not go to trial upon the merits, and take their chances upon the results, and afterwards question the jurisdiction of the court upon any ground which could be waived."

In the course of the opinion, at page 406, the court say:

"The only other objection urged in this case is, that the company filed a petition and bond in the circuit court, for the purpose of removing this case to the United States court. These papers were filed in the circuit court December 20, 1873. It does not appear from the record that any further or other steps were taken for the purpose of removing the cause. No motion was entered or made; the attention of the court does not seen to have in any way been called to this fact; and the parties afterwards, November 25, 1874, proceeded to trial upon the merits without objection, or without questioning the jurisdiction of the court in any way. Whatever rights the company may have had upon filing this bond and petition it could waive, and it certainly, under the circumstances in this case, must be considered as having waived them. The company could not go to trial upon the merits, take its chances upon the results, and afterwards question the jurisdiction of the court.

> "Had the attention of the court been called to the fact that a proper petition and bond had been filed, and the court had nevertheless ordered the trial to proceed, there would then have been no reason for saying that the company had abandoned any of its rights. As we find no error in the record, the judgment must be affirmed, with costs."

In *Pollock vs. Cohen,* 32 O. S., 514 (on the authority of *Ins. Co. vs. Morse,* 87 U. S., 445-450), it was held that the right to have an action removed from a state to a United States court, is a personal right, which may be waived.

In *First National Bank vs. Conway,* 67 Wisconsin, 210-218, begun in the circuit court of Marathon county, Wisconsin, a petition was filed to remove the case to the circuit court of the United States for the western district. The petition was denied and this alleged before the supreme court of the state as an error. On the denial of the petition, one of the defendants named Conway made an application for a change of venue to another circuit court on the ground of the prejudice of the judge, and it was granted.

Held:

> "In this way the defendant took affirmative action in the case and had the benefit of his application for a change of venue to another circuit. This was a waiver of his application to change the venue to the federal court."

In *Wadleigh, Admr., vs. The Standard Life & Accident Insurance Company,* 76 Wisconsin, 439, it was held that:

> "A party may, in the suit itself, waive his right to a removal thereof from the state to the federal court; and, upon application made before a transcript of the record has been sent to the federal court, he should be allowed to withdraw his petition and bond for removal. Such waiver restores the jurisdiction of the state court."

In Federal Case No. 5168, *Gaffney vs. Gillette* (4 Dillon, 264), (C. C. Colo.), heard before Dillon, Circuit Judge, and Hallet, District Judge, the supreme court of Colorado, re-

fused to hear a cause which was pending therein at the time of the state's admission, unless both parties should invoke its action, which they accordingly did by written stipulation of submission. Held, that this was a waiver of any right to remove the case to a federal court after a reversal of the judgment and the return of the cause for a new trial.

In *State of West Virginia vs. King, et al.*, 112 Fed., 369, the court, at page 371, say:

> "The proceedings in the courts of the State of West Virginia were not only inconsistent with the existence of an honest intention on the part of King to remove the case to the circuit court of the United States, but indicated a design on his part, whatever may have been his previous purpose, to proceed with the controversy in the circuit court of Cabell county. This conduct of the defendant King, extending from the 5th day of August, 1901, when his petition for removal was filed, down to and including the 2d day of September, 1901, when he proceeded in prohibition, constituted a waiver of such right as he held, by virtue of the filing of his petition and bond, to remove the case into this court. When the defendant, King, on the 17th day of September, 1901, presented the record of this case to this court, and moved that it be docketed herein, the case was then, by reason of his own action and for purposes of his own, regularly pending in the circuit court of Cabell county, W. Va."

Counsel for Anderson, plaintiff in error here, cites and relies upon the case of *The National Steamship Company vs. Tugman*, 106 U. S., 118, but Mr. Justice Brewer's opinion in *Railway Company vs. Ransom, supra*, carefully examines, and we submit, upon facts much more favorable than those in the case under consideration, completely disposes of the Tugman case as an authority supporting such contentions.

In the case of *Steamship Company vs. Tugman, supra*, no question whatever was made with respect to the petition or bond for removal, or the fact that they were duly brought to the attention of and acted upon by the state court. The Steamship Company was the sole defendant below. None of the questions raised in the case at bar as to joint causes of action being declared upon, were or could have been raised.

The removing defendant consistently maintained an admitted and clear right of removal. In the case at bar, plaintiff in error, Anderson, the plaintiff below, had no such right, yet he contends that he is entitled to complain as though he stood in the place of the Hammond Company, and seeks to shift his position from that of the plaintiff in the action who selected the state jurisdiction for the bringing thereof, to that of a defendant who he claims was entitled to removal therefrom. Further, it is to be noted that in the case at bar the Hammond Company, without presenting its petition or alleged bond to the state court, on agreement with Anderson, and for a consideration, withdrew its petition for removal and thereupon in execution of this agreement, the action was dismissed by Anderson as to the removing defendant, and at the same time was also dismissed as to each and all of the other non-resident defendants. After this judgment became absolute, and at a subsequent term, Anderson entered into a formal written stipulation with the remaining defendants, joined issue, and submitted his case to and tried his case in the state court. After judgment against him he filed petition in error in the state circuit court, and therein, for the first time, raised any question as to the jurisdiction of the trial court.

Substituting the name of Anderson for that of plaintiff in error in *Railway Company vs. Ransom, supra,* we take the liberty of paraphrasing a part of the opinion therein.

> "The first time any question was made as to the jurisdiction of the state court was by the petition in error. * * * Prior to the trial in the (common pleas) court (Anderson) made no question as to its jurisdiction; (he) suggested no want of jurisdiction on a motion for a new trial; apparently (he) elected to litigate (his) controversy with the (parties) in the state court, in the court in which (he) had sued, and only after having been finally defeated in the trial court, did (Anderson) first suggest, and by petition in error in this court that the trial court had lost jurisdiction by the application of its co-defendant (the G. H. Hammond Company) for removal. We think in this (Anderson's) action is too late."

In *Railway Company vs. Ransom, supra,* the defendant complaining with respect to jurisdiction had at least some reason for claiming rights co-equal with the defendant who petitioned for removal, but it was held that any such rights had been waived. But since Anderson was plaintiff below, and had no right of removal, it is certainly an anomaly to claim that such right, if it existed in favor of the defendant, the G. H. Hammond Company, can be imputed to Anderson.

Were the Hammond Company plaintiff in error here, the case under consideration would not be wholly unlike the case of *Amy vs. Manning,* 144 Mass., 153, wherein it appeared that on the last day of the return term, defendant filed a petition for the removal of the case to the United States circuit court on the ground of citizenship, another motion filed at the same time stating that this was done without prejudice to a motion to dismiss and a plea in abatement already filed. He had also filed a general answer to the merits, in which he expressly declared that he did not waive either his plea or his motion to dismiss. At the next term, to which the case had been continued nisi, both the plea and the motion to dismiss were overruled, but the defendant took no further action in reference to the removal until at the fourth term thereafter, when, the case being called for trial, be objected thereto, and requested the court to remove it.

HELD, that he had waived his right to such removal.

This case was affirmed here on writ of error, *Manning vs. Amy,* 140 U. S., 137, and in its opinion, at page 140, it is said:

> "It is familiar law that, in a proper case, the filing of a petition for removal, accompanied by a proper legal bond, operates of itself to remove a case from the state court to the United States court. It is sought to bring this case within that rule; and it is, therefore, insisted that the proceedings in the superior court on the 29th of December, 1884, operated, in law, to oust that court of jurisdiction and to remove the cause to the federal court. We think, however, that such was not the effect of these proceedings."

The rules with respect to removal announced in *National Steamship Company vs. Tugman, supra,* and in *Traction Company vs. Mining Company,* 196 U. S., 239 (also cited and relied upon by counsel for plaintiff in error), are certainly not open to discussion. These decisions were based upon very different facts from those presented by the record in the case under consideration. They do not, of course, include all the phases of removal proceedings established in other preceding and later cases. The very essence and spirit of the right of removal, as announced by this court, presumes objection to the state jurisdiction at the outset of the litigation—the very opposite of invitation and consent as in the case at bar—and a yielding only by the party entitled to removal in respectful obedience to the adverse rulings of the state court.

This doctrine of resistance to the exercise of jurisdiction by the state court had been so explicitly stated by this court just prior to the Tugman case, in *Railroad Company vs. Koontz,* 104 U. S., 5, that it is inconceivable that such a vital principle would be forthwith abandoned by the same court, composed of the same judges. So the conclusion must be that resistance in some respectful form to the jurisdiction in the state courts from the beginning is implied as one of the essential elements in connection with the other phases mentioned by the court.

In *Railroad Company vs. Koontz, supra,* this essential is several times expressed by Chief Justice Waite.

On page 14 the court say:

> "We have uniformly held that if a state court wrongfully refuses to give up its jurisdiction on a petition for removal and forces a party to trial, he loses none of his rights by remaining and contesting the case on its merits."

In this case it also appears on page 7 that exceptions to the ruling of the state court were duly taken and made part of the record.

On page 15 the court again say:

> "If, after a case has been made, the state court forces the petitioning party to a trial and judgment, and the highest court of the state sustains the judgment, he is entitled to his writ of error to this court if he saves the question on the record. * * * * The petitioning party has the right to remain in the state court under protest. * * * Now the question arises whether if the petitioning party is kept by his adversary, and against his will, in the state court, and forced to a trial there on the merits, etc., he can thereafter enter his cause in the circuit court, and the court answers in the affirmative, based on such requirement."

And in the leading case of *Powers vs. Chesapeake & Ohio Railroad,* 169 U. S., 92, the doctrine contended for is reiterated on page 103:

> "The defendant, notwithstanding its objection, duly saved on the record, to the jurisdiction of the state court, having been forced to a hearing in that court, is entitled to have the error in this respect corrected," etc. (Citing cases.)

In this connection it is to be noticed that after the settlement between plaintiff in error and the Hammond Company no controversy remained which could be maintained in the federal court.

Section 5 of the Removal Act of March 3, 1875, 18 Stat., at L. 472, provides:

> "That if in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, * * * the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require."

Thus, under this section, whenever it appears in the federal jurisdiction that the facts upon which the petition for removal was based no longer exist, that the only party having a right to remove is no longer in the litigation, the suit as to him having been settled and dismissed, then it will be clear there is no longer any federal controversy remaining and the case would have to be dismissed or remanded as the statute requires.

Such a situation now appearing (Tr., p. 39), would it not be a vain thing for this court to send the case back through the state jurisdiction in order that it may come up again in the federal jurisdiction, there to be necessarily remanded or dismissed as required by this statute?

Surely the plaintiff in error cannot deny that he has released the Hammond Company from this suit by a binding agreement. He ought not now to be heard to complain of what would have resulted in no benefit to him, or the omission of which could do him no injury.

On this phase of the case the Ohio supreme court in *Anderson vs. Realty Co.*, 79 O. S., page 44, say:

> "In the federal court, to which the case was sought to be removed, on the ground of an alleged separate cause of action against one of the defendants, it would be, as a matter of course, remanded to the state court upon the entry of a discontinuance as to him (Texas Transportation Co. vs. Seeligson, Admr., 122 U. S., 519), or upon a settlemen of the controversy between him and the plaintiff, Torrence vs. Shedd, 144 U. S., 527. There was merely an irregularity in the mode of restoring the jurisdiction, of which the plaintiff will not be heard to complain." Garrozi vs. Dastas, 204 U. S., 64-72, is then quoted on this subject at some length.

In *Torrence vs. Shedd, supra*, on page 533, the court say:

> "If the controversy between the plaintiff and Brown, on the one side, and Sorin on the other, had been such as to justify a removal, there can be no doubt that after that controversy had been settled, as shown by the stipulation of the parties to it, the suit no longer really involved a dispute or controversy properly within the jurisdiction of the circuit court and should therefore have been remanded to the state court, under Sec. 5, of the Act of March 3, 1875, Chap. 137, 18 Stat. at L. 472; Robinson vs. Anderson, 121 U. S., 522; Texas Transportation Co. vs. Seeligson, 122 U. S., 519; Graves vs. Corbin, 132 U. S., 571, 590."

The case would not be so altogether unique and anomalous if the Hammond Company had been a party to the proceedings in the supreme court of Ohio and in this court, but it was not, Anderson improperly assuming, we submit, that he could dismiss this party, proceed with the trial in the state court, and thereafter complain in the place and stead of the Hammond Company. In effect, plaintiff in error seeks to do indirectly what, being plaintiff below, he could not do directly.

The Hammond Company has at no time complained of the judgment rendered by the state court, and is in no position to complain thereof.

The action and judgment of the state trial court, at the September term, 1905 (Tr., 39-40), dismissing Anderson's action against the G. H. Hammond Company, permitting this defendant and The Joseph Schlitz Brewing Company to withdraw their petitions for removal and dismissing the action as to all of the other non-resident defendants, was entered by agreement with Anderson; no objection was made or exception entered thereto, and no proceeding in error was seasonably filed to reverse or vacate these proceedings.

Section 6723, Revised Statutes of Ohio, (now Section 12270 General Code), provides:

> "No proceedings to reverse, vacate or modify a judgment or final order shall be commenced unless within four months after the rendition of the judgment or the making of the final order complained of."
> * * *.

Under the Ohio practice, no appeal would lie from these proceedings, and they were only reviewable upon petition in error. They, therefore, became absolute.

Since plaintiff in error did not take proper proceedings in the case at bar to review the proceedings and judgment of the court of common pleas of Lucas county, Ohio, at its September term, 1905, by the circuit and supreme courts of Ohio, it necessarily follows that they cannot now be reviewed by this honorable court. Their only office in the record, we submit, is as evidence of waiver on the part of Anderson of the right, if any ever existed, to complain on account of want of jurisdiction of the trial court. And such waiver is, we believe, further evidenced by the fact that no transcript of the record in the state court has ever been filed in the office of the clerk of the federal circuit court.

The right of removal must have been asserted in some form in the trial court.

> Mutual Life Insurance Co. vs. McGrew, 188 U. S., 291. .

A party who does not take out a writ of error will not be heard to complain of adverse rulings in the court below.

> Bolles vs. Outing Company, 175 U. S., 262-268.
>
> Loudon vs. Taxing District, 104 U. S., 771.
>
> The "Stephen Morgan," 94 U. S., 599.
>
> Green County vs. Thomas, 211 U. S., 598-602.

We further respectfully submit that by written stipulation filed and proceedings had in the trial of the case at bar,

at the January term, 1906, of the court of common pleas of Lucas county, Ohio, plaintiff in error affirmatively invoked the jurisdiction of the state court and thereby waived all right to complain on account of the alleged removal proceedings.

By this stipulation, dated January 2, 1906, and duly filed in the case at bar within the January term, 1906, plaintiff in error formally agreed with defendants in error concerning the facts in the case, and that:

> "The misjoinder of causes of action in plaintiff's petition, if such there be, are hereby waived by defendants, and all parties to this action do hereby consent and agree to try together all of the causes of action set forth in plaintiff's petition." (Tr. 31-32.)

This, we contend, was a submission of the case at bar to the trial court, authorized by Section 5207 of the Revised Statutes of Ohio (now Section 11472, General Code).

> "Parties to a question which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action were brought; but it must appear by affidavit that the controversy is real, and the proceedings in good faith, to determine the rights of the parties; and the court shall, thereupon, hear and determine the case, and render judgment, as if an action were pending."
>
> Merchants Heat and Light Co. vs. Clow & Sons, 204 U. S., 286.
>
> Texas & Pacific Railway vs. Eastin, 214 U. S., 153.

The defendants in error are claiming the benefit of their written stipulation with plaintiff in error under which this action was heard before, submitted to and passed upon by the state court, and the agreement being admitted, it seems to us that plaintiff in error is and should be adjudged to be estopped to deny the jurisdiction of the state court.

For the foregoing reasons the writ of error herein should be dismissed and the judgment of the supreme court of Ohio affirmed.

Respectfully submitted,

Attorney for the Defendants in Error, The United Realty Company, and Rosewell E. Messinger.

Attorney for the Defendant in Error, Charles R. Messinger.

Attorney for the Defendant in Error, Aaron Chesbrough.

Attorneys for the Defendant in Error, John P. Freeman.

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Attorney for the Defendants in Error, Clarence M. Lamb and Edward H. Thompson.

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ANDERSON *v.* UNITED REALTY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 27. Argued November 1, 1911.—Decided December 4, 1911.

Where there is a separable controversy and requisite diversity of citizenship it is the duty of the state court to accept the petition and bond and proceed no further in the case; trial and judgment thereafter by the state court would be *coram non judice* unless its jurisdiction over the cause be restored.

The state court may recover jurisdiction over a cause which has been removed by defendants having separable controversy, and where plaintiff has an order entered dismissing it against the removing defendants and other defendants having like ground of removal reciting that in consideration of such dismissal the petition for removal is withdrawn, the state court has jurisdiction to proceed against the remaining defendants. *National Steamship Co.* v. *Tugman*, 106 U. S. 118, distinguished.

79 Oh. St. 23, affirmed.

THE facts are stated in the opinion.

Mr. Rhea P. Cary for plaintiff in error:

There was in this case a separable controversy between the Hammond Company and the original plaintiff, who is the plaintiff in error herein. *Barney* v. *Latham*, 103 U. S. 205; *Bacon* v. *Felt*, 36 Fed. Rep. 871; *Stanbrough* v. *Cook*, 38 Fed. Rep. 369; *Pacific Railroad Removal Cases*, 115 U. S. 2; *Bates* v. *Carpenter*, 98 Fed. Rep. 452.

The fact that neither the plaintiff or defendant was an inhabitant of the Northern District of Ohio, did not preclude the Circuit Court of the United States from acquiring jurisdiction upon the filing of the petition and bond for removal in the common pleas court of Lucas county, Ohio. *McCormick Machine Co.* v. *Walthers*, 134 U. S. 41; *St. L. & S. F. Ry. Co.* v. *McBride*, 141 U. S. 127; *Ex parte Wisner*, 203 U. S. 449; *In re Moore*, 209 U. S. 490.

Upon the filing of the petition and bond for removal, the state court was divested of jurisdiction of the suit, and its subsequent orders were *coram non judice* and void. *Railroad Co.* v. *Koontz*, 104 U. S. 5; *Steamship Company* v. *Tugman*, 106 U. S. 108; *Traction Co.* v. *Mining Co.*, 196 U. S. 239.

Mr. Harry E. King, *Mr. Clayton W. Everett* and *Mr. Oliver B. Snider*, with whom *Mr. Edward H. Rhoades*, *Mr. Edward H. Rhoades, Jr.*, *Mr. Elmer E. Davis*, *Mr. George A. Bassett* and *Mr. Rathbun Fuller* were on the brief, for defendants in error.

Memorandum opinion by direction of the court. By MR. JUSTICE LURTON.

The single question for our consideration upon this writ of error concerns the jurisdiction of the state court to proceed with the action after one of the original defendants had filed its petition and bond for removal to the Circuit Court of the United States.

If, as we shall assume, there was a separable controversy and the requisite diversity of citizenship, it was the duty of the state court to accept the petition and bond and proceed no further in the case. A trial and judgment thereafter would be *coram non judice*, unless its jurisdiction over the cause and the parties was in some way restored. *National Steamship Co.* v. *Tugman*, 106 U. S. 118; *Trac-*

tion Company v. *Mining Company*, 196 U. S. 239, 253. But we are of opinion that the plaintiff in error is not in a position to now assert that the state court's subsequent exercise of jurisdiction was without authority. When the removal petition and bond were filed, the plaintiff, before any order was made in the state court or the record filed in the United States court, had an order entered in the state court dismissing his action against the removing defendant and certain others having like ground of removal, the order reciting that in consideration of such dismissal the petition for removal was withdrawn. Thereafter the cause was proceeded with against the remaining defendants without the hint of any objection by either the plaintiff or the remaining defendants. Upon the contrary, many steps were taken and a long jury trial had, resulting in a verdict and judgment for the defendants. Not until the cause was carried to the Ohio Circuit Court by appeal of the plaintiff was there any objection made to the jurisdiction of the trial court.

The state court had jurisdiction over the subject-matter. It recovered jurisdiction over the remaining parties by action and conduct equivalent to a formal waiver of new process and new pleadings or any formal remander by the United States court.

The *Tugman Case*, cited above, does not help the plaintiff in error. The defendant whose right to remove had been erroneously denied was held not to have waived his right to remove by subsequently consenting to a reference of the case to a referee, or by defending the suit both before the referee and the court without protesting. This court said (p. 123):

"When the State court adjudged that it had authority to proceed, the company was entitled to regard the decision as final, so far as that tribunal was concerned, and was not bound, in order to maintain the right of removal, to protest at subsequent stages of the trial against its ex-

ercise of jurisdiction. Indeed, such a course would scarcely have been respectful to the State court, after its ruling upon the point of jurisdiction had been made."

If, on the other hand, he had thereafter invoked the court's jurisdiction in his own behalf, he would not have been permitted later to deny it. *Texas & Pac. Ry.* v. *Eastin*, 214 U. S. 153; *Garrozi* v. *Dastas*, 204 U. S. 64, 73; *C. & O. Ry.* v. *McDonald*, 214 U. S. 191.

Judgment affirmed.